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INSURABLE INTEREST

AND

VALUATIONS.

BY

RICHARD LOWNDES,

Author of

"The Law of General Average," "The Law of Marine Insurance," &c.

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INSURABLE INTEREST & VALUATIONS.

INTRODUCTION.

I WAS spending some time yesterday in working at the second edition of my little book on Marine Insurance, and was at work on the first chapter, on "Insurable Interest," when the reflection kept coming across me that these very topics which I was then dealing with after my fashion, and concerning which the very fact of my dealing with them implied that I thought I had something to say about them, would in the course of the coming spring and summer certainly occupy a good deal of the attention of Parliament, and probably be discussed at large in a Grand Committee of the House of Commons. I had collected materials, some of them not very easily accessible, and in their present grouping and combination nowhere else to be found, which might be very serviceable in this debate; and these I was about, of necessity, to pack up again and condense into so small a compass, for the sake of proportion to the rest of the volume, that they would be of no use for any purpose of discussion in Parliament, unless they were spread out again by some one else.

Why should I not postpone my volume, and in the meanwhile write the first chapter, or a portion of it, more at large in the form of a pamphlet or some such thing? I could in this manner perform the useful function of what the lawyers term a Devil, possibly, to some of those distinguished men who will take part in the debate on Mr. Chamberlain's Bill on the law of shipping, so far as it has reference to marine insurance; I could supply them, possibly, here and there with a quotation, if not with a suggestion for an argument. Failing even in this, my time would not be thrown away, my pamphlet would serve for my chapter, as one of Leech's or Du-maurier's larger drawings is afterwards compressed into a cartoon for *Punch*.

Perhaps I may be allowed here to add, as this pamphlet may fall into the hands of some to whom I am not known, that I possess one qualification for the task I have set before me, in the fact that I have been for forty years and more an adjuster of averages; that is to say, that my business has obliged me to become closely acquainted, not theoretically only, but in its actual working, with the system of marine insurance; to be behind the scenes, to discuss most intimately with merchants and shipowners, as well as underwriters, the practical bearings first of this and then of another rule of law in this department. And these are not dry theoretical discussions, but wherever the passions are aroused by a grievance, or the suspicions by a fraud—or what looks like one,

the adjuster, though merely as a bystander or adviser, hears all, and cannot fail to make his own reflections.

The misgivings concerning the possible or actual mischiefs of marine insurance which in our own times have been energetically expressed by Mr. Plimsoll, and more recently by Mr. Chamberlain, are by no means new; on the contrary, similar and even stronger misgivings are to be found in the oldest jurisprudence concerning this contract, and have from its very beginning operated in shaping the laws of every country concerning it. Marine insurance has always been recognized as an extremely useful, but likewise a very dangerous, contrivance. Text writers, possibly from an unconscious tendency to magnify their office, have dwelt chiefly on its utility, which no doubt has been enormous; but legislators have been quite as much alive to its dangers. The result has been, as I propose to show in detail, that marine insurance has at no time and in no country, or certainly not long together anywhere, been allowed to develope itself freely so that its fundamental idea may be carried out without restriction. Still, as a contract permitted only under limitations, those limitations have by degrees so been moulded, or have so moulded themselves, that marine insurance has in many countries, and particularly in Great Britain and the United States, adequately performed its function as the handmaid of commerce.

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gains, and that largely, and all over the world, namely, the consumer; since insurance in several ways tends to lower market prices, and to keep them steadier.

Such being the proper function of marine insurance, it is obvious that it must perform this function most perfectly if it can be so arranged that the merchant or shipowner who insures shall, in the event of shipwreck or marine disaster, be put in precisely the same pecuniary position as if that disaster had not taken place; shall be neither a gainer nor a loser by it; that so he may regard such an event as immaterial to him, and leave it altogether out of his calculations. And this is, from one point of view, the idea, or perfect form, of a law of insurance,—to make marine disaster absolutely immaterial to the assured.

But this idea has, from the very bottom, to be qualified by another consideration. The indemnity given by insurance, if it ought to be accurately computed as to amount, ought no less, indeed, for practical purposes, ought much more, to be promptly and certainly paid. A somewhat rough approximation as to amount may suffice, provided the merchant or shipowner can rely on obtaining that amount in time to replace, for the carrying on of his business engagements, the capital of which he has been deprived by the shipwreck. For this reason, because dispatch and certainty are so much more important to the merchant than any nice computing of the

exact amount he should receive, and because the exact amount cannot in many cases be computed without much delay and some uncertainty, there have been introduced into the practice of insurance, from the very earliest times on record, certain contrivances for gaining dispatch and certainty of settlement at the expense of theoretical accuracy. And these contrivances are now, partly from long use, but probably still more from their inherent usefulness, so embedded in the law and practice of marine insurance, that it would be very difficult and perhaps dangerous to attempt to tear them out.

The strength and prevalence of this feeling in early times may be detected in various provisions of the older Codes and Ordinances for discouraging undue litigation by obliging the underwriters, before raising any objection to a claim, to pay first and (if they please) go to law afterwards; the assured of course giving security to refund the amount in case the underwriter's objection should be sustained in the Courts. This has long fallen into disuse, no doubt by reason of the improvement of our legal procedure in respect of cheapness and dispatch; notwithstanding which it may be suspected that mercantile men of the present day, who have by no means wholly cast off that almost morbid horror of law and love of prompt payment which characterized their predecessors in the fifteenth and sixteenth centuries, would see the revival of this ancient regulation without regret.

Another no less marked indication of the same feeling, or rather necessity springing out of the pressure of mercantile engagements, is to be found in the very early adoption of a rule of indemnity, contrary to true principle, and only justifiable for its great convenience in promoting a prompt settlement —the rule, that is, that the assured shall be indemnified on the basis of what his goods have *cost* him at the place of shipment, and not of what he may reasonably expect to sell them for at their intended market. The latter obviously is the true measure of the merchant's real loss by a shipwreck. This must have been evident to the keen-witted Italian merchants by whom insurance was invented, and gradually brought to a high degree of perfection with little or no aid from lawyers; and, in fact, we can trace a period when this very question—which of the two methods of indemnity should be adopted—was a matter of uncertainty and keen debate. But this debate was ended, and the practice of merchants all over Europe was settled in one way, more than a century before the question was for the first time brought into an English court of law. The less perfect mode of compensation was preferred to the other, presumably—for there is no other way of accounting for it—because of its superiority in respect of certainty and dispatch.

The manner in which the system was worked in the older times, so as to facilitate prompt settlements, may be traced, more than conjecturally,

from some passages in the *Guidon de la Mer*, the oldest extant treatise on insurance. The *documents* of the goods, we are there told, were required to be "conformable and relative" to one another: and these documents were, the bill of lading in proof that the goods were actually on board, the invoice, to show how much they had cost, and the policy or contract of insurance (*a*). Upon the happening of a loss, these documents, with no further proof of interest or value, enabled the merchant to recover an immediate indemnity from his underwriter, who was required at once to pay, so that the merchant might resume his trading, giving the requisite security for a refund in case the underwriter should thereafter be proved not liable.

In somewhat later times a further step was made in the same direction of prompt and definite settlements of claims. It was found convenient to dispense with the production of invoices, by introducing into the policy itself a valuation of interest, which the underwriter agreed at the time of insuring to accept as final. This sum he was to pay without question in the event of a total loss; and he was to pay a proportionate part of it in case the half or quarter or any definable proportion of the goods were lost. This contrivance at once extremely simplified the recovery of claims on a policy, and hence was highly acceptable to the assured, and it likewise recommended itself to the underwriter, as facilitating the

(*a*) Guidon, ch. 2, § 8; 2 Pardessus, 381.

computing of his risks. It must not be forgotten that, from the underwriter's point of view, necessarily, insurance is neither more nor less than a wager. The premium is the price of the risk; and the ratio of the premium to the sum insured being once defined, as, for instance, at so much per cent., it is immaterial to the underwriter how large a sum is agreed on as the value: each individual underwriter takes so much only of it as he pleases; all he desires is, that the sum he is to pay in case of loss may, if possible, be defined beforehand, so that the bargain may be clear.

This fixing of the value beforehand carried with it a further advantage, very likely not foreseen or intended when the contrivance was first introduced, but which was gradually found to be one of great importance, and is at the present day very highly esteemed: it enabled the merchant to remedy the defectiveness of the old rule of indemnity, which was limited to what the thing insured had cost. What a thing has cost is by no means always a correct or adequate measure of the value its owner rightly sets upon it. No merchant takes the trouble and runs the risk of buying goods and sending them to another port on the bare expectation of there selling them for what they cost; he expects a profit, and this expectation is the very ground and reason of his venture. If he is not allowed to set a value on his goods fairly equal to this reasonable expectation, his insurance does not offer him a com-

plete indemnity; a shipwreck cannot be a matter of indifference to him, and the fundamental idea of insurance is to that extent not carried out. This defect is even more striking when we consider the position of the shipowner; his profit, or that which answers to it in some degree, is the freight which he expects to earn in payment for the carriage of the goods. This freight used to be almost always, and still is most frequently, payable at the end of the voyage, and not payable except in the event of safe arrival. Here is an expectation, important and sometimes large in amount, definite, and certain but for the perils of the navigation. There is no reason in the nature of things why it should not be insured; indeed, a shipowner cannot be at all adequately protected against loss from sea peril except by insuring it; and yet freight is not an interest that can practically be defined by any measure of *cost*. No doubt a shipowner does not earn his freights without some outlay of money; he must first build or buy his ship, equip and victual her, man her with seamen, pay port dues of various kinds, and so forth; but what portion of this cost should properly be allotted to the particular freight in question is a matter which certainly cannot be determined with that accuracy and promptitude which the payment of a loss under a policy of insurance requires. Here the conditions existing in the case of merchandize are exactly reversed; whereas it is easy to prove what the goods have

cost, but may be difficult to prove what they would have sold for, it is very difficult to prove what the freight has cost, whereas it is defined with exactness, by the bill of lading or charterparty, what amount of freight would have been received. When the insurance is on freight, then the amount of indemnity recoverable in case of loss must be, the amount of freight expected. This being so, the owner of goods finds no reason why a similar measure of indemnity should not be extended to him. His expectation of profit may not be so definite as the shipowner's expectation of freight; but it is as real; he has acted on it in resolving on his adventure; and he can, at the time of loading and insuring his goods, set upon it a value, the recovering of which in case of shipwreck will for practical purposes compensate him for losing the goods. The system of agreed valuations adapts itself to the peculiarities of a merchant's temperament and circumstances. If he is of an anxious disposition, or is trading to the full stretch of his capital, and therefore afraid to run an unnecessary risk, he can, by a full valuation, secure himself against anxiety so completely as even to know that a shipwreck would be a source of gain to him; if he desires to economise the payment of premiums, and is willing to venture a little himself, he can attain his object by valuing low. And in all this his underwriter finds his account in encouraging him; he merely adjusts his rate of premium so

that to every hundred pounds insured there shall be annexed a little profit, and then the more the merchant wishes to value his goods at, the better is the underwriter pleased. The third great subject-matter of insurance is the ship. For insuring ships, an agreed valuation is so great a convenience to both parties, that it is really difficult to understand how the business of insuring ships can have been carried on before this contrivance was hit upon. This subject, however, must be reserved for fuller discussion elsewhere.

Concerning valuations I shall here only add one fact; namely, that although it is always optional to the assured, either to make a valuation beforehand, or to have what is called an "open" or unvalued policy, leaving the amount recoverable to be proved from invoices or documents after a loss, yet such "open" policies, either on ships or goods, have almost ceased to exist; out of the enormous mass of insurances effected year by year, it is only now and then, and then most commonly through some oversight or forgetfulness, that an unvalued policy occurs. It cannot, therefore, be said that the advantages of valuations are not appreciated by mercantile men. Open policies on freight, on the other hand, are not uncommon: the reason obviously being, that the amount recoverable under such policies is for the most part easily and exactly defined by the contract of affreightment, so that there is not the same necessity for a valuation.

Here, then, we have, in outline, what may be termed the purely mercantile idea of marine insurance, such as it has grown into in the first four hundred years or so of its development. Mercantile men, in framing it, may be supposed to have troubled themselves very little about such questions of public policy as, whether this contrivance is likely to be useful to the community, favourable or otherwise to the safety of life and property at sea, conducive to the national morality, or the like: they have confined themselves to the question whether it is of service to themselves in the conduct of their own business; and, finding that it is, have used it largely. How large a scale the use of it has already reached, may be gathered from a passage in a pamphlet recently published by a very competent authority, Mr. J. T. Danson, who writes: "I should be disposed to estimate the total value of the ships, freights and cargoes, afloat under British insurance, at one time, at an average of about one hundred and thirty millions" (*b*).

This idea may be summarily formulated thus: Let any one who has an expectation of pecuniary gain, depending on the safe performance of a voyage by a ship, be allowed to insure that expectation; and in order that his insurance may be effectual for his purpose, let him be able to know that when a

(*b*) Underwriting in England, France, and America, during the last Three Years. By J. T. Danson. Administration of the Bureau Veritas. London, 1883, p. 14.

loss occurs he may count on promptly receiving from his underwriters such or such a definite sum of money; let him be at liberty to insure the whole amount of his expectation, or any part of it, as he pleases; and, that there may be no haggling afterwards as to the amount, leave it free to the underwriter and himself to agree, at the time of insuring, what that amount shall be.

This, however, is only one aspect of the subject. There is also, besides the mercantile, what may be termed the statesman's point of view. It remains to be considered whether an unrestricted liberty to insure is conducive to the welfare of the community.

That which raises a doubt on the matter, is the consideration, which presents itself under various forms, that the practice of insurance takes away one of the principal safeguards for property and life exposed to hazard on the seas, in taking away from him who is to build and fit out a ship, and from him who is to select a suitable ship for the carriage of his wares, that motive for caution which is given by immediate self-interest. The shipowner or merchant who insures may feel that the safety of the ship on her voyage is a matter of indifference to him. It is hardly necessary to follow out the possible results of this indifference to their various consequences: scamped work in the building of a ship, stinted equipments, under-manning, unwise economy in every department, over-loading, undue venturing on hazardous voyages, carelessness in the

selection of officers,—in a word, the conduct which may be expected from men, some of whom may be of lax principle, under constant temptation to work as cheaply as they can, when relieved of the natural penalty for carrying economy too far, because any loss which may ensue from it does not fall upon themselves. Nor is this all; we have still to take account of the possibility of deliberate fraud. Nothing is easier than to effect insurances to an extent far beyond the real value of the property; and when this is done, it may be in the power of those who have the safety of that property entirely in their hands, to make a large gain by casting it away. These are the considerations which have at all times led statesmen and legislators to regard marine insurance as a dangerous thing, needing to be carefully watched and guarded against abuse.

The manner in which this has been done has varied very much in different times and countries. It is a task of considerable delicacy. The abuses ought to be guarded against, effectually indeed, but so as not to interfere too much, or unnecessarily, with the proper use of this contract, which is all but absolutely indispensable for the carrying on of maritime commerce on a large scale. At the present moment, when a fresh point of departure in this task is under consideration, it may not be unprofitable to set forth, somewhat at large, the history of one or two previous undertakings of the same kind.

What I propose here by way of contribution towards this task is to show, first, how insurance has grown up, from one common root, and at first and for a long period in a form common to all maritime countries; then how it was developed in France, where that which I have called the statesman's view of the subject has from the first been almost too dominant; and, lastly, what changes it has gradually undergone in passing through France into the English courts of law, and how in this process the statesman's view has been almost completely lost sight of, while the mercantile aspect has had almost absolute free swing. I hope to conclude with a few observations bearing on the courageous and thorough-going attempt which has been made this Session of Parliament to bring about a different state of things.

§ 1. ORIGIN OF INSURANCE.

WHETHER insurance was known to the ancients has been the subject of much learned conjecture. No traces of it have been pointed out among the Greeks, or in the East; but in Rome it is otherwise. The Pandects of Justinian, indeed, though dealing largely with bottomry and general average, are entirely silent as to insurance; and there is no such word in classical Latin: but there are some three or four passages in Livy, Suetonius, and Cicero, collected by Emerigon, which have been supposed to indicate the existence of such a contract. On this material, eked out by reasonings based on certain *â priori* assumptions more or less questionable, Park and Duer have constructed essays very pleasant to read, the former denying, the latter affirming, that insurance was practised during the times of the Roman Empire. Marshall has also written on the same subject, perhaps with greater solidity of judgment than either. But by far the most valuable dissertation on the question, so far as I know, is one much less familiar to English lawyers. It is to be found in the first volume of the invaluable collections of M. Pardessus (*c*). The conclusion come to by that learned writer is, that there certainly

(*c*) Pardessus, Collection de Lois Maritimes, vol. i. pp. 72 to 76.

existed at that period what may be called the germs of insurance, or practices which might naturally have suggested and led up to this contract; but not insurance itself, in the modern acceptation of the term. When munitions of war, for example, were conveyed in ships by the merchants who supplied them for the use of the state, we find instances in Livy where the Republic guaranteed the merchants against the risk of storm and capture. The Emperor Claudius gave a similar guarantee, in a time of famine, to merchants whom he desired to encourage to transport corn to Rome. There are passages in the Digest, showing that where, of two contracting parties, one or other must necessarily run a certain risk, it was allowable—and therefore presumably the practice existed—to transfer that risk to the other by express stipulation, as in the case of a workman entrusted with precious stones for mounting, who, though not otherwise liable, might agree to take upon himself the risk of the jewels being lost or destroyed by accident. The passage in one of Cicero's letters in which he speaks of obtaining sureties (*praedes*) by whose means the spoils of his victory in Cicilia might be sent from Laodicea to Rome, so that he himself and the Roman people might be secured against the risk of the transit, whether it indicates an insurance or some contract analogous to the modern bills of exchange, certainly goes so far as to indicate a sense of the desirableness and possibility of in some way guarding against the

perils of navigation, by transferring the liability to a third party. All this certainly comes very near to insurance. But Pardessus points out that in most if not all of these instances the guarantee against sea peril is merely subordinate to some other principal contract: the idea of insurance as an independent contract by itself, carried out by persons who make it their business to run this risk in return for a fixed price or premium, is nowhere to be found, unless indeed possibly in the passage from Cicero, the applicability of which to insurance is for other reasons questionable. The negative argument, from there being no such word as insurance, or any equivalent, in the language (*d*), and from the silence of the Pandects, appears to Pardessus to prove conclusively that insurance cannot have existed as a part of the ordinary mode of carrying on commerce in those times.

The true origin or invention of this contrivance, then, must be placed at a much later period, after these provisions of the Roman law, and indeed that law itself, and the civilization which made such laws possible, had been buried in oblivion during a comparative barbarism of more than a thousand years. We are told by Gibbon that the memory of the laws of old Rome had so far been obscured that there is reason to believe only one copy of the Pandects survived: this "was transcribed

(*d*) *Assecuratio*, the word used in mediæval Latin, is a mere barbarism.

at Constantinople in the beginning of the seventh century, and was successively transported by the accidents of war and commerce to Amalfi, Pisa, and Florence" (*e*). This survivor of a lost jurisprudence made the reputation of the city of Amalfi in a somewhat remarkable way. This code appears to have been used by the authorities of that city for the determining of questions that arose, and in particular of disputes on matters of maritime law; and its reputation, no doubt by reason of its intrinsic merit, by degrees extended so far that, as we are told by Freccia, who lived in 1570, all over the kingdom of Naples every such controversy was determined, "not by the Rhodian law, but by what they call the Table of Amalfi" (*f*). And Mr. Justice Park, in the introduction of his book on Marine Insurance, writing in 1796, goes so far as to say, "To the people of Amalfi we are indebted as well for the first code of modern sea laws, as for the invention of the compass" (*g*). We are no doubt under great obligations to the people of Amalfi, but rather as custodians than as originators of a body of sea law. As for the supposed code of Amalfi, which had made so great a reputation, and had been so often quoted, for Park is by no means without authority for his assertion, Pardessus tells us that he had searched for it in vain, finding no traces of its existence, notwith-

(*e*) Decline and Fall, ch. 44.

(*f*) 1 Pard. 145.

(*g*) Park, Ins. Intr., p. lxix. 8th ed.

standing a long and sustained correspondence with persons the best able to assist such an investigation in the kingdom of Naples (*h*). The probable conclusion seems to be that the supposed code of Amalfi was nothing else but this lost copy of the Pandects, used perhaps at first without acknowledgment of its real origin.

Coming now to modern Europe, and proposing to set forth in an orderly outline the older traces of marine insurance, we are met at once by a difficulty, which seems to prevent our getting higher than a reasonable probability of conjecture. This is, the uncertainty of the dates, and hence of the comparative antiquity, of many of the principal documents we have to depend on. Their origin was frequently obscure; the original editions, whether in manuscript or print, are for the most part lost; the dates are only to be gathered from internal evidence, much of which is discernible by none but the very few who are deeply learned at once in the history of maritime law and in that very imperfectly-recorded subject, the history of maritime commerce. Lastly, the matter is confused by the credulity of old writers who have repeated many things, demonstrably fabulous or mistaken, which seem to find favour in proportion as they are marvellous. In the present sketch I relieve myself of all these difficulties by accepting implicitly the conclusions of M. Pardessus,

(*h*) 1 Pard. 146.

referring the curious or sceptical to the arguments in support of them which he has set forth.

There is reason to believe that before insurance, properly speaking, was known, there had grown up a practice not altogether unlike what we now call mutual insurance,—that is to say, a voluntary banding together of all those interested in a common adventure,—the owner of the ship and all the owners of goods on board,—to share rateably amongst themselves, by a contribution, any loss which any one of them might sustain through shipwreck, or certain other principal disasters of the sea (*i*).

The chief traces of this practice are to be found in the remarkable compilation called Jus Navale Rhodiorum, which is now recognized as a very ancient fabrication of the middle ages, falsely claiming a still higher antiquity; and in the Consolado del Mare, a treatise of great merit, and of almost equally unknown parentage. The consideration of this subject, however, belongs rather to the law of general average than to that of insurance. It is enough here to say that in these older documents, and likewise in the laws of Oleron and Wisby, there is no mention of insurance properly speaking.

The contract known under the name of insurance has, from the earliest times of its recorded existence, had the characteristics of being an independent

(*i*) 1 Pard. 210.

contract, in which one or more (usually a good many) persons undertake, for a stated price or premium, to indemnify some other person against the risks of navigation. This payment of a stated premium as the price of the risk is the essential characteristic of insurance properly so called.

The origin of this contract, thus defined, may be placed with some probability as far back as about A.D. 1200.

"Giovanni Villani," says Duer, "is the most justly celebrated of the early Florentine writers. The learned and eloquent Sismondi, in his recent history of the Italian Republics, adopts him as his guide in a large portion of his narrative, and in terms of unusual force commends his fidelity, and extols his genius. The exact period of his birth is unknown; but as he died at an advanced age in 1348, it probably occurred between the years 1270 and 1280. He was actively engaged in the business of life; was prominent as a statesman in many of the leading transactions of his time; and, from the confidence reposed in his talents and integrity, was elevated in succession to the highest offices in his native republic. It remains only to mention, as giving a peculiar force to his testimony, that for a considerable portion of his life he was largely embarked in mercantile pursuits, so that his knowledge of the usages of commerce was intimate and personal. It is upon the authority of this historian that Cleirac, the French jurist

to whom I referred, founds his assertion that insurance was invented by the Jews, who, when expelled from France by Philip Augustus, in the year 1182, found a refuge in Italy; that they resorted to this expedient to secure themselves from the losses attending the transportation of their property and effects from the country in which they were proscribed, and that the merchants of the North of Italy, who witnessed the success of the device, struck with its utility, were prompt to adopt and extend its use" (*k*).

"This relation," says Marshall (*l*), "though adopted by so respectable a writer as Cleirac, carries with it very little of the air of probability."

(*k*) 1 Duer, 29, 30. The passage in Cleirac, which Judge Duer refers to, is as follows:—"Les polices d'asseurance, et les lettres de change, furent méconnues à l'ancienne jurisprudence Romaine, et sont de l'invention posthume des Juifs, suivant la remarque de Giovan Villani en son histoire universelle. Pour retirer leur meubles, leur merchandise, et leur autres effects toujours a la Juifues et aux risques et perils de ceux qui leur rendoient ce bon office. La mefiance leur suggera l'invention de quelque rude commencement des brevets, ou polices d'asseurance, par lesquelles toutes les risques et dangers du voyage tomboit sur ceux qui les auoient asseurés, moyennant un present ou prix moderé qu'on nomme à present *primeur*, ou *la prime*, de sorte que les lettres de change et les polices d'asseurance sont juifues de naissance de mesme invention et nomination, *Polizza di Cambio*, *Polizza di Sicuranza*. Les Italiens, Lombards, spectateurs et ministres de cette intrigue Juifue, en retindrent le formulaire, et s'en sceurent du depuis bien servir." Cleirac, Us et Coutumes de la Mer, tit. Le Guidon, Art. 1, p. 182. 1 Duer, 30.

(*l*) Marsh. Ins. 4.

"In what its improbability consists," answers Duer, "I confess my inability to discover. The sagacity of the Jews in matters of finance is well known, and they were placed in circumstances of difficulty and distress that were well calculated to sharpen their invention. . . . That the narrative of Villani exhibits the tradition and belief of his own age we cannot doubt, and it is difficult to admit the supposition that the tradition of an event comparatively so recent—a tradition of little more than three generations—could have been materially erroneous. Yet, even on the supposition that it was wholly groundless, the testimony of Villani is still conclusive to show, not only that insurance was practised when he wrote, but that it had already existed for so long a period that no certain account of the date or authors of the invention could be given. It must then have existed for more than half a century prior to his own birth, as within a shorter period the memory of its actual origin could not have been wholly lost. It follows that the commencement of the practice of insurance in Italy cannot, upon any hypothesis, be referred to a later date than the beginning of the thirteenth century; nor are there many facts in history, not attested by evidence strictly contemporary, that rest upon proofs more direct and certain" (*m*).

However this may be—and I see no reason for

(*m*) 1 Duer, Ins. 31.

dissenting from Judge Duer's conclusions—it is not till the following century that we find anything else at all approaching to contemporary traces of the existence of this contract, or even of the word insurance, *assecuratio*, *siguranza*, by which it has always been denoted. The earliest of these given by Pardessus is in a manuscript, in the archives of Sassari, in Sardinia, extracts from which were sent to Pardessus by Manno, author of the History of Sardinia (*n*). This bears the date of 1316; but Pardessus inclines to believe that it is the translation of a still older copy, in Latin. At this time, and as far back certainly as 1191, the island of Sardinia was very much under the influence, not to say dominion, of the Republic of Pisa, and there were on the island several Pisan settlements or trading stations; and the maritime commerce of the island appears to have been by no means inconsiderable. The manuscript in question, written on parchment, is a sort of code or body of law, dealing with a great variety of subjects; and among the rest there are regulations for the conduct of twelve public brokers, *sensali*, appointed by the Pisan consuls of the port. These official persons are required to take an oath that they will not themselves embark in mercantile operations; will not lend money on usury; will not arrange for shipping on freight, *or for insuring*, any goods or

(*n*) 5 Pard. 270.

merchandize in any ship coming to the port of Bagnaia di Castello di Castro, or lying in the said port. This last provision is contained in Art. 47 of the code (*o*). The words are "*naulegare u sigurare.*" Whether the latter word is intended to refer to insuring, or merely to securing a place for the goods in the ship, may be questionable; and Pardessus, who in his fourth volume adopts the former reading (*p*), prefers the latter in his fifth volume, which was published two years later (*q*). The question is not very important; but if insurance was at that time known, it seems not likely that so technical a word would be used in other than its technical sense; although, if the passage stood alone, it might not be enough to prove that insurance was at that time known.

One might expect that some light would be thrown on this matter by a reference to the records of the laws of Pisa itself at the period in question. What there is, however, is only scanty, and that rather of a negative character. There exists a record of the

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(*o*) 5 Pard. 307. The entire passage, in the original, is as follows:—"Anco juro alle Sancte Dio uaela che non andro u mandro, u mandare faro, per me u per altrui, ad alcuno legno vegnente al porto di Bagnaia di Castello di Castro, u vero stante in del dicto porto, in alcuno modo uue ragione per quello legno naulegare, u sigurare ne alcuno mercato, u sansalatico fare u fare fare di fuori di castello alcuna cosa, u mercie d'alcuna persona u luogo."

(*p*) 4 Pard. 567.

(*q*) 5 Pard, 281.

ancient laws of this republic, under the twofold title of *Constitutum Legis* and *Constitutum Usus*. The former, in the opinion of Pardessus, was drawn up before A.D. 1156; the latter may be dated A.D. 1160. These laws appear to have remained in force until the final subjugation of Pisa by Florence, A.D. 1406. How far they were gradually amended and enlarged in successive editions we have no means of knowing, except that one copy, in the archives of the Reformation in Florence, bears the title, "*Si legge statuti della città di Pisa del anno* 1161 *e* 1262"(*r*). These statutes contain no mention whatever of insurance. Pardessus will not allow us, however, to infer from this silence that insurance was unknown to the Pisans during this period. In such matters, he says, facts exist long before men take the trouble to record them, and still more before legislators make them the subject of their laws or regulations (*s*).

Pegolotti, whose work relating to the commerce of Florence was certainly composed in the first half of the fourteenth century, in speaking, at page 200, of the duties of brokers in Florence, speaks of engagements (*conventions*) *a rischio de mare e di genti*. Uzzano, in his Treatise on Commerce, composed in 1400, speaks expressly, at pages 119 and 128, of insurances made at Florence for London and for Bruges (*t*).

(*r*) 4 Pard. 555.
(*s*) 4 Pard. 563.
(*t*) 4 Pard. 567. I have not myself seen either of these works.

There is a passage in an old statute of the Republic of Genoa, the date of which unfortunately is not defined with precision, showing that insurance must at that time have been a familiar and established practice; for it lays down, among the duties of a court entitled *officium mercantiae*, that it shall deal with all causes and controversies *concerning insurance* (*u*). This statute, says Pardessus, must certainly have been anterior to 1408; for in the copy, printed in Bologna in 1498, we find appended to it additional statutes of the year 1408 (*x*). It is called the Statute of 1143, but we do not know what additions may have been made from year to year between these two dates.

Coming now out of Italy, it is in the first place impossible not to notice the somewhat remarkable circumstance that the Rolls of Oleron, by far the most authoritative exposition of the mercantile law of Europe at the date with which we are dealing, make no mention of insurance. The date of these Rolls is certainly, according to Pardessus, anterior

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"These documents," says Pardessus, "lead us to believe that the usage was still more ancient; for they suppose a state of things known and established."

(*u*) The words are: "Sit etiam dictum Officium judex competens de et super omnibus et singulis questionibus, causis et controversiis que coram eis movebuntur occasione assecurationum, quamvis de ipsis esset confectum publicum instrumentum vel scriptura privata. Item de questionibus que vertuntur inter patronos et eorum participes." 4 Pard. 420.

(*x*) 4 Pard. 420.

to 1266. These laws were adopted in Castile, in Flanders, in the Low Countries, in the principal towns of the Baltic, in many provinces of France, and in some qualified sense in England, having been incorporated in our Black Book of the Admiralty. Tradition, however, assigns to these Rolls a much earlier date; otherwise, the inference might not unfairly be drawn from this silence, that in the thirteenth century the practice of insurance can hardly have extended beyond the cities of Italy.

"The City of Bruges, in 1381, was frequented," says Meyer, "by merchants of all countries, even the most remote, who had established counting-houses or residences there, for Flanders was the established emporium for the goods of almost the whole world: the merchants of seventeen kingdoms had then at Bruges their settled domiciles and seats, not to reckon those of comparatively unknown countries who continually came and went there" (*y*).

In a work called *Chronyk van Vlaendern* (*z*), cited by Pardessus, who does not give the date, there is the following passage: "On the petition of the inhabitants of Bruges, he" (the Count of Flanders) "permitted the establishing in that town of a Chamber of Insurance, by means of which the merchants could make insurance on their goods, exposed to hazard on the sea or elsewhere, at the price of a

(*y*) Meyer, Annales Flandrici, p. 67; 1 Pard. 355.
(*z*) Ch. xl. p. 462; 1 Pard. 356.

certain premium (*moyennant quelques deniers pour cent*), as that is still practised. And in order that an institution so useful to merchants might not be dissolved as soon as formed, he prescribed diverse laws and forms, which the merchants were bound to observe." The authenticity of this narration, which does not appear to rest on contemporary authority, is questioned by Pardessus (*a*), who, however, in a later volume, appears inclined to retract his doubts (*b*).

These are the only vestiges, at all trustworthy, which I have been able to discover in the collections of Pardessus, or in Emerigon (*c*), or any other authorities within my reach, of the existence of marine insurance prior to the sixteenth century. These, however, appear quite sufficient to attest its existence and steady if silent spread throughout Europe. In the sixteenth century we find, not yet indeed anything to give us an idea what this new form of contract is like, but yet ordinances or laws which clearly prove that at the time when they were passed insurance had become a recognized and established practice, and one of considerable importance. I may instance (*d*) the Ordinance of the

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(*a*) 2 Pard. 370.

(*b*) 4 Pard. 567.

(*c*) What Emerigon says concerning the Ordonnance of Wisbuy (Ass. Intr.) is shown by Pardessus, vol. i. p. 432, to be founded on a misunderstanding.

(*d*) Duer (Intr. xxxix.) gives several others of the same kind

City of Burgos in 1538, and that of Bilbao in 1560; the Regulations of Florence in 1522, and of Genoa in 1518; and the Statute of our Queen Elizabeth in 1601. It would be a piece of idle diligence to pursue this subject further (perhaps it has been such already), for we have now come to a period as to which there is no dispute. The preamble to the Statute of Elizabeth shows that insurance had already existed in this country long enough for its origin to have been forgotten. The words are:—

"Whereas it hath been tyme out of mynde an usage amongst merchantes, both of this realme and of forraine nacyons, when they make any greate adventure (speciallie into remote partes), to give some consideracion of money to other persons (which commonlie are in no small number), to have from them assurance made of their goodes, merchandizes, ships, and things adventured, or some part thereof, at suche rates and in such sorte as the parties assurers and the parties assured can agree, whiche course of dealing is commonly termed a policie of assurance; by means of which policies of assurance it commethe to passe, upon the losse or perishing of any shippe

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and date: as, of Barcelona, 1484; that of Charles 5th at Brussels, 1551; of Philip 2, also at Brussels, 1563 and 1565; of the Hanse Towns, 1597; and of Lübeck, 1614. The number might probably be multiplied. About this period the governments of Europe appear to have begun to concern themselves about regulating the mercantile tribunals or chambers, which had so far regulated disputes relating to insurance.

there followeth not the undoinge of any man, but the losse lighteth rather easilie upon many than heavilie upon fewe, and rather upon them that adventure not than upon them that doe adventure, whereby all merchantes, speciallie the younger sorte, are allured to venture more willingly and more freelie;

"And whereas heretofore suche assurers have used to stande so justlie and preciselie upon their credites, as fewe or no controversies have risen thereupon, and if any have growen the same have from tyme to tyme been ended and ordered by certain grave and discreete merchantes, appointed by the Lord Mayor of the Citie of London, as men by reason of their experience fitteste to understande and speedilie to decide those causes, untill of late yeeres that divers persons have withdrawen themselves from that arbitrarie course, and have sought to drawe the parties assured to seeke their moneys of everie several assurer, by suites commenced in her Majesties Courtes, to their greate charges and delayes."

For these reasons the statute proceeds to provide a Court called "The Office of Insurance of the City of London," for determining all questions and causes concerning policies of insurance (*e*).

The ordinances of this period, however, almost without exception, are occupied merely with pro-

(*e*) 43 Eliz. c. 2; 4 Pard. 210.

viding tribunals for the trial of causes relating to insurance, and laying down rules for the conduct of such tribunals: they tell us nothing—almost without exception—as to the principles on which the contract of insurance itself is to be carried out. This is still, apparently, a matter strange to the legislator, and, as it were, a secret amongst the merchants who practise it. The only exception—for I will not except the verbose, obscure, and contradictory provisions in the Ordinances of Burgos and Bilbao—is to be found in the Ordinance of Florence of the year 1523, with its continuations in 1526 (*f*).

This ordinance lays down the following points:—Every insurance shall be according to the general form actually in use, or if any different or special clause is desired, permission must be obtained from the five deputies, officers specially named to regulate matters of insurance. Every policy must contain the name of the ship, and the voyage; and of these a register is to be kept. The rates of premium are to be fixed by the five deputies. A broker, appointed by the deputies, is to draw up each "writing of insurance"—the term "policy" appears not yet to be in use—according to a stated form. In all insurances, the premium is to be paid down in ready money. If, at the time when an insurance is made,

(*f*) 4 Pard. 598—605. I hope hereafter to set forth this important ordinance in full.

the ship has been already lost, and if the news of her loss might have reached the assured at the time when he made the policy, he ought not and cannot recover from the insurer. If a ship or cargo is damaged or lost by shipwreck, the deputies may, for the saving of the said ship or cargo, prescribe and cause to be executed by whomsoever they see fit such measures as may seem to them advisable, and the expenses they incur shall be supported and borne by the property saved; and in case of need they may levy a contribution on the said merchants and insurers. By a subsequent order, in 1523, certain hazardous or valuable articles, of which a list is given, comprising slaves, fruit, wine, vitriol, money, are not to be insured under the common name of goods, but are to be specially described in the policy. An insurance made in contravention of any of these regulations is to be void, and the insurer may keep the premium. No insurance shall hold good unless the voyage is commenced within a year. If goods are, with the consent of the owner of them, carried on a ship's deck, and are lost, the insurers shall not be held to pay for them, but may keep the premium. If they are laden on deck without the consent of the proprietor, the owner of the ship is liable for their loss: the insurers do not guarantee their assured, but if they choose to pay the loss, they succeed to the rights of the assured against the ship owner. The clause in the policy (which appears to have been part of the ordinary formula) that the insurer is

"first to pay, and afterwards to plead," "*prima si abbia a pagare, e poi litigare*," is explained to mean, that the assured is first to produce the bill of lading or other authentic proof of the shipment of his goods, and likewise proof of their loss, and is then entitled to recover without any further formality. If an insurance is made in Florence, and likewise in some other place, the assured is bound to give information of both insurances to the Chancellor of the Office of Assurers, in order that it may be seen which of the two policies is liable for the loss; and action is to be taken only against the earlier in date, if the whole is insured in both places, though it is allowable to insure a part in one place and a part in another. Every policy must contain the name of the assured, the sum for which the insurance is made, the name of the ship if it is known, the name of the captain, how much per cent. has been paid, in what place and for what place the insurance has been made.

The Ordinance of 1526 concludes with a formula for a policy, the most ancient extant in Europe, which I shall set forth elsewhere.

We have now before us, I believe, if not all the materials which exist, at least all that are of practical value, for enabling the reader to form an accurate conception of the manner in which the idea of insurance grew first into shape.

This contrivance or invention may with confidence

be ascribed to what has been called the Golden Age of the Italian mercantile cities, a period commencing with the establishment of their independence after the Peace of Constance in 1181, and continuing for about two centuries from that date. During that time, says Sismondi, the aspect of the principal cities of Italy "was one of a prodigious prosperity, which contrasted so much the more with the rest of Europe that nothing but poverty and barbarism were to be found elsewhere" (*g*). These cities, the same author tells us, were for the most part paved with flag-stones, while the inhabitants of Paris could not stir out of their houses without plunging into the mud (*h*). "Pisa was the first to introduce into Tuscany the arts that ennoble wealth: her dome, her baptistery, her leaning tower, and her Campo Santo, had been successively built from the year 1063 to the end of the twelfth century" (*h*). Florence emulated Pisa, though later. "The palace of the podestas and *signoria* united strength with majesty. The most admirable of those of Florence, the *Palazzo-Vecchio*, was built in 1298. . . . A pure taste, boldness, and grandeur struck the eye in all the public monuments, and finally reached even private dwellings; while the princes of France, England, and Germany, in building their castles, seemed to think only of shelter and defence" (*h*) Sculpture, painting, music, and poetry followed; it

(*g*) Italian Republics, p. 107. I quote from Lardner's edition.
(*h*) Ib. 108.

was the age of Cimabue and Giotto, of Casella, Dante, Petrarch, and Boccaccio. What is perhaps most remarkable in the art of this period, and perhaps most of all in its architecture, is its entire originality, and hence in the amount of inventiveness it displayed. This no doubt is due to the extraordinary intellectual activity which at this period seems to have been astir in the inhabitants of all the cities of Italy, and especially of Lombardy. "In Italy," says Sismondi, after setting forth the very different state of the rest of Europe, "liberty secured the full enjoyment of intellectual activity. Every one endeavoured to develop the powers which he felt within him, because each was conscious that the more his mind opened the greater was his enjoyment; every one directed his powers to a useful and practical purpose, because each felt himself placed in a state of society in which he might attain some influence, either for his own benefit or that of his fellow-creatures" (*k*). The study of the sciences of medicine, law, politics, and philosophy, the latter first beginning to emancipate itself from the schoolmen, were much cultivated in these cities at this period. Here, also, began the revival of ancient learning. "Fragments only of classical works remained, scattered throughout Europe, and on the point of being lost." The learned men of Italy towards the end of the fourteenth century—Petrarch and Boccaccio among the number—"col-

(*k*) Italian Republics, p. 157.

lected, collated, and explained them; without their antiquarian zeal, all the experience of past ages, all the models of taste, all the great works of genius, would never have reached us, and probably without such guides we should never have attained the point on which we now stand" (*l*).

"The arts of necessity and of luxury," says our author, "had been cultivated with not less success than the fine arts; in every street warehouses and shops displayed the wealth that Italy and Flanders only knew how to produce" (*m*). "The Florentines . . . . had in their city manufactures renowned through the western world, particularly that of woollen stuffs, which occupied more hands than any other, and those of silk and gold brocade. Their merchants were the greatest capitalists of Europe; their counting-houses were scattered throughout the commercial parts of the world; and their funds were often lent to princes at enormous interest" (*n*).

The Italians of this period undoubtedly profited much by their intercourse with the Saracens, began perhaps at the time of the Crusades, but which afterwards became more intimate, owing to the settlement of the Saracens in Sicily, and to the commercial relations between them arising out of their traffic with the East.

Thus there sprung up by degrees the first im-

(*l*) Ib. 154. (*m*) Ib. 109. (*n*) Sism. 222.

portant maritime commerce of modern Europe: by means of caravans, which penetrated as far as Cabul on the Upper Indus, and Canuge on the Ganges, and even, it is said, as far as China (*o*), the tempting products of the East were brought to these Italian towns, and, in Italian bottoms for the most part, were transported beyond the Straits of Gibraltar, and made known to the inhabitants of Spain, France, England, Flanders, and the north of Europe as far as the Baltic. Italian ships thus became the carriers of Europe.

There is a passage in Marshall which throws a singular light on the relative position of commerce in England and in the Italian cities about the period we are dealing with.

"The Lombards," he says, "still engrossed the whole of the carrying trade with England. Some attempts were made by parliament, in the reigns of Edward II. and Richard III., to encourage English shipping, but without effect; for we find that in the 18th year of Henry VI. the Commons petitioned that no Italian or other merchant of the countries beyond the Straights of Gibraltar should sell here any other merchandize than that of the countries beyond those straights. And the reason assigned for the regulation thus prayed was, that the Italians had become the carriers, not only of the commodities brought from the countries within

(*o*) 1 Pard. lxxxvii.

the straights, but also of those from the countries without the straights, which were not brought in such abundance, nor sold so cheap, as when they were brought by the merchants of the countries from which they came. They prayed, therefore, that this might pass into a law for ten years; but the King did not consent to it. At length, however, by stat. 1 Rich. III. c. 9, great restraints were laid, both upon these Italian merchants and their trade" (*p*).

These Italian merchants, indeed, did much more than invent insurance; they invented, and brought into use, the whole complicated mechanism of the modern commercial system. Until their time, the invariable practice, continued from antiquity, had been for the merchant to sail from port to port with his own wares; these he would himself dispose of when he reached the destined haven, and either spend the proceeds in the purchase of other goods, or bring them home, or carry them to be laid out in some better market. It was the merchant princes of Italy, men great at once in commerce, and in the public life of their own State, who, led by the necessity of their position to leave to deputies the task of watching over their trade, by degrees developed a more artificial system of conducting business. They sent supercargoes or agents in charge of their

(*p*) 1 Marsh. Ins. 12; Marshall cites Reeves's Hist. of Shipping, pp. 12, 15.

merchandize; planted factories or houses of correspondence in the different countries they most traded with; invented what is still called the Italian art of book-keeping; employed consignees and brokers, and devised rules and a new branch of law for regulating their dealings; invented also bills of exchange, for the purpose of remitting money from port to port without actual transit; and in many such ways, as well as in devising an elaborate set of rules for perfecting their system of marine insurance, found in commerce ample opportunities for giving play to their subtle and ingenious inventiveness.

What is very remarkable is, that, though by no means averse to the use of the pen, and though there exists ample written materials for forming a very detailed picture of their way of life in almost every other respect, yet in what concerns the growth of this great commercial activity the Italians of this period have left behind them extremely scanty records. This is not more true of insurance than of the other branches of their commercial enterprise. The explanation suggested by Sismondi for this reticence is that the habit of secretiveness, on all matters connected with their mercantile affairs, had been formed in times when these thriving and energetic traders had lived in constant terror of the feudal barbarism around them and even maintaining its castles within the walls of their own cities.

§ 2. THE GUIDON DE LA MER.

BETWEEN the years 1556 and 1584, so far as may be gathered from internal evidence, was first printed the earliest treatise on insurance which we possess, the only document, if we except the Florentine Ordinances of 1523—1526, from which, up to this point of time, we can glean any detailed information as to what insurance was.

For some three centuries and a half, then, from the rude beginnings about the year 1200, there had been a gradual growth and development of this contract, adapting it to the great expansion of modern commerce, from a time when merchants sailed like pedlars with their wares in little vessels which went timidly guided by the stars, in the summer season only, along the Mediterranean sea, to the times when Cosmo de Medici, a sovereign prince in Florence, was the head of a commercial establishment which had counting-houses in all the great cities of Europe and in the Levant (*a*), and onward to a time when the Cape of Good Hope had been doubled, America discovered, and great galleons brought gold and silver from Peru and Mexico. And the history of this entire development of insurance, during which, after we know not what

(*a*) Sismondi, 224.

internal conflicts and fermentation, it assumed a shape substantially the same as that it still retains, has perished almost without a trace. This circumstance gives a peculiar value to the Guidon, in which we may hope to find the results of this long period of activity.

A preliminary question will perhaps here suggest itself, particularly to a lawyer: what have we to do with the insurance law of Italians or Frenchmen? It may even be asked whether the Ordinance of Florence can be taken as showing more than the municipal law of a town of Italy, and the Guidon, written in Rouen, more than, at most, the municipal law of France. The answer is, that the law-merchant, in its early stages, was regarded throughout Europe as not merely municipal, but one and the same for the merchants and mariners everywhere. The merchant was for many centuries as migratory a being as the sailor, and had personal dealings by turn in every port in Europe; and it would be highly inconvenient if he could not find one common rule of dealing wherever he might go; and, as a matter of fact, throughout Europe, and even in a country always so insular in sentiment as England, this idea of a law-merchant everywhere the same prevailed and was acted on, long after the merchant himself had ceased to wander with his wares.

Between the years 1556 and 1587, then, in "the noble city of Rouen," there was set forth in print a small volume of about a hundred pages, by an

unknown hand, called the "*Guidon de la Mer*," or "Guide of the Seas." The preface (*avis au lecteur*) invites "all who put forth and traffic by sea, such as merchants, captains of ships, masters, mates (*contre-maistres*), pilots, and those who exercise command through the fact of navigation, as well as those who have never made traffick, but shall desire to lay out their money in that way," to read this book and they shall here find "the style and usance how to guide themselves aright, without the need of seeking counsel elsewhere." The writer then relates how the volume came to be printed. This present copy fell into his hands, he says, through a man unknown to him. The original had been drawn up "by two of the able merchants and the richest in the city, who composed it in order to communicate it to their friends and not for posterity; but God, knowing their hearts, has willed that he who had the original in his hands should lend it to make a copy to one who sold it to me, and I should have been very ungrateful and full of temerity if I had not put it into the press. I have corrected it as well as was possible, following my copy. If it has faults do not accuse the printer, but him who transcribed it. If it shall please the reader to correct it, and add to it something of his own, promising on the first impression to bring in on my part what I can. Adieu" (*q*).

(*q*) This preface is curious enough to be worth setting forth at full length. "*Au lecteur, salut.* Tu seras adverti (amy lecteur)

Valin, without giving any reason for it, appears to consider this *avis au lecteur* as merely throwing dust in the reader's eyes, and treats the Guidon as the work of Cleirac, who sets this forth in his collection of *Us et Coutumes de la Mer*, first published in 1656 (*r*). But Pardessus declares this assertion to be completely erroneous. With his usual diligence, Pardessus had made search for and discovered copies of the Guidon, other than that given by Cleirac: of these one bore the date of 1607, and another of 1645. These old editions, however, contained so

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que ces jours passez il me tomba entre les mains ce present Guidon, par un homme incogneu, lequel l'ayant fait voir par gens à ce cognoissant, et voyant qu'il estoit propre au public, et principalement à ceux qui mettent et trafiquent par la mer, comme aux marchands, capitaines de navire, maistres, contremaistres et pilotes, et ceux qui ont commandement par le fait de la navigation, mesmes à ceux lesquels n'ont jamais fait trafic, et qui desireroient y employer leurs deniers, ici ils trouveront le stille et usance pour leur y bien gouverner, sans aller au conseil d'autrui; car à ce que je puis avoir apprins depuis que j'ai eu ladicte copie entre les mains, tirée sur l'original, que ça esté deux des habiles marchands et les plus riches de ceste ville, en leur vivant, qui l'ont composé pour en faire part à leurs amis et non à la posterité; mais Dieu, cognoissant leurs coeurs, a voulu que celui qui avoit l'original entre ses mains, l'aye baillé à en faire une copie à celui qui me l'a vendu, et eusse esté bien ingrat et plain de temerité si je ne l'eusse mis sur la presse. Je l'ai corrigé du mieux qu'il m'a esté possible, suivant ma copie. S'il y a des fautes, n'en accusez l'imprimeur, mais celui qui l'a transcrite. S'il plaist au lecteur de la corriger et y apporter quelque chose du sien, lui promettant à la premiere impression y apporter de ma part ce que je pourrai. Adieu." (2 Pard. 373.)

(*r*) Valin, *Commentaire sur l'Ordonnance de la Marin.* Edit. 1829. Preface, pp. xviii., xix.

many faults of the printer and obscurities that Pardessus found himself obliged after all to fall back on Cleirac's version, the style of which he tells us he has himself modernized here and there. Cleirac indeed is far from claiming the authorship; the author, he says, is unknown; the work, through the carelessness or stupidity of copyists or correcters of the press, had been so stained with errors, faults, omissions and transpositions, that it had fallen into as much contempt as a diamond in the rough: for his part, in order to make its meaning clear, he had added a few occasional notes (*s*).

This volume has been called "the oldest treatise on insurance." But there are reasons for at least conjecturing it to be not so properly a treatise as a body of rules intended for the governance of the Consular Court of Rouen. Such a Court, called that of the Prior and Consuls, was introduced into that city, after a pattern then very common throughout Europe, in the year 1556, and continued to exist there until 1584, when its place was taken by a Court of Admiralty; and the references to the Prior and Consuls in the Guidon prove that the book belongs to that period. Claims concerning policies of insurance had, prior to 1556, been dealt with by an official of inferior rank called the Greffier, who appears to have been still retained in the new Consular Court, but in a subordinate position; and it appears a not unlikely conjecture that this so-called

(*s*) 2 Pard. 374.

Guidon was originally a body of rules and instructions, drawn up by an able and experienced Greffier for the guidance of his new chiefs; instructions not intended for publication, but of which a copy had been obtained in some surreptitious manner, and printed, probably, with many imperfections. Some such theory seems needed to explain the curious mixture of argumentation, customs and customary rules, and positive—one may almost say arbitrary—regulations, which are to be found in this remarkable work (*t*).

Some general idea of the contents and arrangement of the book may be gathered from the titles of the several chapters, which are as follows:—

Chap. 1. On Contracts or Policies of Insurance, their definition, conformity with, and difference from other Maritime Contracts.

2. What the Policy of Insurance ought to contain.

(*t*) For example, in Ch. 8, Art. 1, whereas the rule had formerly been that the master's statement on oath was to be accepted as final, the Guidon, after pointing out the abuses this was liable to, goes on to say, "*parquoy à l'avenir lesdits maitres ne seront croyable, ni leur equipage, au simple serment,*" and proceeds to set forth some very sensible rules for cross-questioning them in the presence of the merchants; thus at a stroke changing the system of procedure from one of affidavits to *vivâ voce* evidence. Other similar instances might be given. That the consuls of the various seaports of Europe about this period and earlier proposed manuscript books or codes for their official guidance, which were zealously kept private, may be learnt from a curious account which Pardessus gives of such a document used by the consuls of Pisa. (4 Pard. 558—560.)

Chap. 19. The divers Obligations contracted by the Master of a Ship.
20. Duties of the Greffier of Policies.

To all this there is appended a formula for the policy of insurance.

I shall here content myself with setting forth so much of the Guidon as refers, first, to insurance in general; and, secondly, to insurable interest and the valuation of it.

Maritime Law known under the Name of the Guidon de la Mer.

Assurance is a contract by which one promises indemnity of things which are transported from one country to another, especially by sea, and this by means of a price agreed at so much per cent., between the assured who makes or causes to be made the transport, and the insurer who promises the indemnity. (Chap. 1, § 1.)

Assurances are made and set forth by a contract in writing, commonly called a policy (*u*) of insurance. (Ib. § 2.)

Assurances may be divided, inasmuch as some are made on the merchandize, others on the body of the ship, others are drawn up on both together; again, they may be contracted for the voyage out,

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(*u*) From the Italian, *polizza*, or *promise*.

others for the return; and divers policies may also be stipulated for in one and the same contract (*et diverses polices se peuvent aussi stipuler dans un mesme contract*). (Ib. § 3.)

Two things ought to be conformable and relative to the policy; the first is the bill of lading, or acknowledgement given by the master of the ship, of the number and quality of the merchandize laden on board, which bill of lading ought likewise to contain the marks of the merchandize, to whom it goes consigned, whether it is well or ill-conditioned, and the rate of freight. Of these bills of lading there should be made three copies; one remains with the merchant shipper, the next is delivered with the letters and addressed parcels to the master of the ship, the third is sent by another ship, or by land by the ordinary messengers or posts, to him who should receive the merchandize. (Chap. 2, § 8.)

The invoice or cargo-book (*facture ou cargaison*) ought likewise to be conformable, as well to the bill of lading as to the policy, and ought to contain a summary declaration of the sort and quantity of the goods laden, with subscription or entitlement of the name of him to whom they go and belong; the name of the master or of the ship in which they are laden, and the name certain to whom they go consigned; the mark thereof, and the account of the price that they cost, as well by purchase as the expenses, dues (*mises*), and ordinary averages, as are embaling, packing, carriage, duties, with the com-

mission of him who makes up or addresses the cargo, and the cost of insurance; as, if to insure 1,000 livres at 15 per cent. it requires 150 livres, it is lawful to insure the said 150 livres, and to put into the line of the account 22 livres 10 sols for the cost of insuring that, and so on consequently from the largest to the smallest sum. (Chap. 2, § 9.)

As to this, it is proper to note that while the merchant shipper is at liberty to insure the whole or a portion of the merchandize, yet always, in the event of average, ransom, or composition, it is necessary that he should employ the insurance of the total, should draw up his invoice in the manner aforesaid, in order to make the apportionment or contribution on the shilling to the pound (*au marc la livre*), not only on the sums assured, but also on that which remains to insure, of which he the shipper has reserved the risk for himself. (Chap. 2, § 10.)

In like manner, to avoid abuses, and the great negligence which is found in merchant shippers when they are insured for the whole, all these are bound, following the order of other places or exchanges, to run the risk of 10 per cent., that is, the tenth of their cargo, for which tenth they shall contribute to averages, ransoms and compositions when they shall occur. (Chap. 2, § 11.)

Concerning the valuation of the merchandizes there exist great differences of opinion (*grands discords*); for some have held that the estimation ought to be made, having regard to the time of the loss; others,

to the time when the ship has arrived safe in port [perhaps more literally, at a port of safety]; the more recent are of opinion that regard should be had to the time of the purchase, as is practised in the drawing up of cargo-books or invoices [*carguaisons et factures*]. (Chap. 2, § 12.)

Furthermore, valuations may be made in the policy; but if they exceed by half, one-third, or a quarter of the just price, when a loss occurs, the insurer objects to them (*en prend deffence*), taking it as a maxim that the assured cannot receive profit by the loss of another; but, if such valuations held good, not only they would give occasion to infinite losses, but also the assured would make his condition better than if the property arrived in safety; wherefore, as fraudulous and full of deception, they are to be reduced to what the merchandize has cost (*x*) at the place of purchase, whether on credit or for ready money; and if they were obtained by barter, at the price it was worth at prices current at the place of barter, to which must be added all the dues and charges, as has been said above in speaking of invoices. (Chap. 2, § 13.)

The insurer in everything trusts to the good faith (*prud'hommie*) of his assured; for, notwithstanding that the merchant shipper sets forth on the policy

(*x*) In all times, says Pardessus, the laws on insurance have taken great precautions against deceitfulness in valuations. See Valin, tit. 2, p. 136; Emerigon, tit. 1, pp. 262, 270, 276, 278; 2 Pard. 383, n.

the terms and conditions under which he intends to make assurance, nevertheless the insurer, when he signs for the sum he takes, does not enter into a verbal conference with the assured; he merely reads what is written on the face of the policy, without seeing the sort, quantity, or quality of the merchandize, following in that the relation, good faith, and honesty of his merchant shipper, pre-supposing that he is loyal in his traffic; if he acts otherwise, he ought not to find it strange if, when a loss occurs, like a ward, a widow, or an absent party, who cannot or ought not to be imposed upon, the insurer founds his defences and exceptions on the deceit or fraud of his assured, which defences are admissible if he can prove them. (Chap. 2, § 15.)

When a loss occurs to the ship or goods insured, the merchant shipper will cause his act of abandonment (*delais*) to be made by the greffier, notary, or sergeant royal to his insurers, with declaration that he hopes to be paid the sums which each shall have insured within two months from the same day. (Chap. 3, § 1.)

During this time he shall give order to draw up the attestations of the loss, shall make verification of his bills of lading, and shall certify his invoice to be accurate; for, notwithstanding his abandonment, before he can recover his loss, he is liable to three things: first, he ought to furnish sufficient proof of the loss or capture, giving the hour and the place when it occured, if this can be done; secondly, the

charterparty or bill of lading duly verified; thirdly, the invoice sworn and certified genuine, if so be that by the policy the merchandize has not been valued. Further, he must tender his oath that he has not made any other insurance, either in this city or elsewhere, than this under which he is demanding indemnity; must deliver the documents above-stated if he is possessed of them and required, but in any case he is in strictness obliged to produce them within the two months. After these things are furnished, if the assurers wish to dispute them, they may do so, if, within the first or at most the second appointment (*y*), the difference can be decided. But if they fall upon proofs, or should wish to offer to make new attestations so as to retard the judgment, the Prior and Consuls "*tireront outre*," shall condemn each of the said assurers to pay provisionally the sums they have assured upon the engagement upon oath (*caution juratoire*) of the merchant shipper if he is notoriously sufficient; if he is a stranger he shall furnish valid security (*caution valable*), because if the merchant shall be defeated at the end of the cause he shall for his rash claim be condemned in interest from the day of payment. (Chap. 3, § 2.)

By usance of the Bourse of Rouen, insurances are made, not only on the merchandize, but also on the

(*y*) That is, in one or two hearings before the mercantile tribunal of first instance (the prior and consuls) which dealt with questions of insurance.

hulls of ships, their rigging, and apparel, victualling for certain voyages, but by no means on the freight. (Chap. 15, § 1.)

The owner may insure, not only the share he has in the ship, but also the amount which his share has cost him, so that he may be clear, in sailing his ship when put out to sea abroad or in the Roads, so or provided that he reserves for himself to run the tenth part, including therein the cost of the insurance and the cost of the cost of it; and of all this he shall furnish a statement, the truth of which he shall certify on oath, whenever and as fully as he shall be required, just in the same manner as the merchant shipper does with the cargo. The shipowner may value in the policy the share he has in the ship, and on that valuation may make his assurance. (Chap. 15, § 3.)

§ 3. THE ORDONNANCE OF LOUIS XIV.

Cleirac probably brought out the Guidon from great obscurity. How much he himself did towards modernizing the language of it, and making it intelligible, we cannot tell: but even independently of the "stains and blemishes" which, as he tells us, had led to its "falling into contempt as a diamond in the rough," its value at the time it was published cannot have been comparable to its value now, when it happens to be the sole record of the state of insurance law at a period of peculiar interest. At the time, it can only have been regarded as setting forth in writing matters which were familiarly known on many a Bourse or street of insurers, such as our Lombard Street appears to have at one time been. The science of insurance, and its rules, have been handed down, with extraordinary fidelity, from the earliest days to the present, or certainly to the youth of the present writer, by a species of oral tradition, which has been to a great extent independent, and sometimes unwisely contemptuous, of any contribution from books or lawyers. It has been a body of unwritten custom, jealously guarded, and sometimes purposely shunning publicity. This

state of things is only now coming to an end (*z*). But the Guidon, as brought into notice by Cleirac, had an important influence on the maritime legislation of Europe, by being, to a great extent, embodied in the celebrated *Ordonnance de la Marine of Louis XIV.*, which was issued in 1681, twenty-five years after the publication of Cleirac's book.

Louis XIV., says Valin, had already, before issuing this Ordonnance, merited the title of the legislator of France, by the Ordonnances or Codes published under his authority dealing with several branches of civil and criminal law. But this on the law maritime, he says, was undoubtedly his masterpiece; and, from its excellence, it was gradually adopted as the basis of all the maritime laws of Europe. It is certainly true that most of the European States, within a few years, followed the example of France, by issuing codes of mercantile law; in all of which, though with variations by no means unimportant, we find a striking similarity to that of France. In England, too, as we shall see, the influence of this Ordonnance was very great.

The names of the real author or authors of the Ordonnance have not been preserved. Valin relates, but apparently does not believe, an anecdote which ascribes the actual drafting of it to an advocate not

(*z*) It is only last year, for example, that our Courts of Law determined that the customs of Lloyd's—the English version or survivor of this old unwritten law—have no binding authority.

named, concerning whom it is told that Louis XIV., having in recompense given him the post of Master of Requests, was afterwards obliged to take it from him, his abilities not proving sufficient for it (*a*).

It may not be without interest to the reader, if I here note down one or two facts related by Valin and Pardessus, which throw light on the manner in which the materials for this code were collected.

"Among the manuscripts in the library of M. the Duc de Penthièire," says Valin, "manuscripts which his highness has been good enough to lay open to me, there is (No. 848) a learned, curious, and vast compilation of ancient maritime laws, that is to say, of the Rhodian and Roman laws, the Consolado, and the "Les et Coutumes de la Mer," the Ordonnances of Charles V. and Philip II., Kings of Spain, the Judgments of Oleron, the Ordonnances of Wisbuy and of the Teutonic House, of insurances of Antwerp and Amsterdam, the Guidon de la Mer, of projects of edicts and regulations drawn up by order of Cardinal Richelieu, lastly, of our Ordonnances up to 1660; the whole collated (*conferé*) together, with the opinions of several authors, and arranged under different titles. It appears to me most probable that this rich collection, made by a very able man, has served to form this Ordonnance. At least it is sure that it was made with this view, since in several places it

(*a*) Valin, Preface, viii.

rejects certain observations, saying 'that they are not of a nature to enter into an Ordonnance or be made the subject of it'" (*a*).

Further, a special commission was given in 1671, to one M. Lambert, Marquis de Thibouville, to visit the several seaports of the kingdom, and there to examine and inform himself of "the jurisprudence, statutes, regulations, ordinances and decrees, which the officers of the admiralty had made use of heretofore;" and he was charged to note with care the jurisprudence of each Admiralty Court, to observe their defects, and to transmit his opinion on this subject to the commissioners who would be appointed by his majesty to decide on them, and eventually to form a complete body of Ordonnances which may for the future serve for the officers of the admiralty, without having recourse to those foreign ordinances which had served them hitherto (*b*).

Pardessus, convinced that the manuscript referred to by Valin was, if not the only, at least one of the preparatory works undertaken for drawing up the Ordonnances, made great exertions to ascertain whether this or any similar document were still in existence (A.D. 1837); but all his researches and enquiries were without result (*c*). He found, however, in the

(*a*) Valin, Preface viii., ix.

(*b*) Ib. ix.

(*c*) 4 Pard. 241. The Admiralty Courts of those days, it should be borne in mind, dealt with all sorts of maritime questions, including those connected with average and insurance.

Depôt de la Marine at Versailles, a copy not authenticated, but very ancient, of the instructions given to the Marquis de Thibouville, which he sets forth at length (*d*).

The various materials thus collected, it appears, were transmitted to the minister Colbert, "who was the soul of all the projects of Louis XIV." (*e*). They were referred to a body of commissioners, to be brought into shape, and the draft (*f*) was eventually settled in the king's council.

As in the last section, I here extract only those clauses of the Ordonnance which deal with insurance generally, and insurable interest.

ORDONNANCE DE LA MARINE.

Title VI. On Insurance.

Art. 1. We permit all our subjects and also foreigners to insure or cause insurance to be made within the extent of our kingdom, on ships, merchandize and other effects which shall be transported by sea or navigable rivers; and we permit the insurers to stipulate a price for which they shall take on themselves the risk.

Art. 8. If the insurance is made on the body of a ship, her rigging, apparel, armament, and victuals,

(*d*) 4 Pard. 241.

(*e*) Ib. 243.

(*f*) Pardessus gives reasons for considering the actual draftsman to have been a lawyer named Le Vayer de Boutigny. Ib. 245.

or on a portion, the valuation thereof shall be made by the policy, it being open to the assurer, in case of fraud, to cause a fresh valuation to be proceeded to.

Art. 15. The owners of ships, or the masters, cannot make insurance on the freight to be earned by their vessels; nor the merchant, on the profit hoped for on their merchandize; nor the seamen, on their wages.

Art. 16. We forbid those who borrow money on bottomry, to insure it; under penalty of nullity of the insurance, and of corporal punishment.

Art. 17. We also forbid, under the like penalty of nullity, the lenders on bottomry to make assurance of the profit on the sums they shall have lent.

Art. 18. The assured shall always run the risk of one-tenth of the goods they shall have laden, if there is not an express declaration on the policy that they intend to insure the whole.

Art. 19. And if the assured are in the vessel, or if they are the proprietors of it, they shall not fail to run the risk of one-tenth, even though they have declared that they have insured the whole.

Art. 20. It shall be lawful to the insurers to re-insure with others the goods (*effects*) they have insured; and to the assured, to make insurance on the cost of the insurance, and on the solvency of the assurers.

Art. 22. We forbid the making assurance on goods (effects) beyond their value, by one or more

policies, under penalty of nullity of the insurance, and confiscation of the merchandize.

Art. 23. If, however, there is a policy made without fraud, which exceeds the value of the goods laden, it shall hold good up to the amount of their estimation; and in case of loss the assurers shall be held to it, each in proportion to the sums by him assured, and shall also return the premium on the surplus, reserving one-half per cent.

Art. 24. And if there are several policies thus made without fraud, and that the first amounts to the value of the goods laden, it shall hold good alone; and the other insurers shall be released from the insurance, and shall return the premium, reserving one-half per cent.

Art. 25. In case the first policy does not amount to the value of the goods laden, the insurers on the second shall be answerable for the surplus. And if there are goods laden for the contents (*contenu*) of the insurance, in case of the loss of a part, it shall be paid for by the insurers above designated, in the proportion (*au marc la livre*) of their interest.

Art. 28. The insurers shall not be bound to bear loss or damage accruing to the ship or merchandize through the fault of the master or mariners, unless by the policy they take on themselves the barratry of the master.

Art. 53. The assured shall be bound, on making his abandonment, to declare all the assurances he has made, and the money he shall have taken on

bottomry upon the goods insured, under penalty of being deprived of the effect of the insurances.

Art. 55. And if he makes claim to the payments of the sums insured beyond the goods, he shall in addition [besides losing the benefit of his insurance] be punished exemplarily.

Art. 56. The assurers on the cargo cannot be compelled to payment of the sums by them assured, beyond the extent of the value of the goods of which the assured shall have proved the lading and the loss.

Art. 64. The value of the goods shall be proved (*justifiée*) by books or invoices; if not, the valuation of them shall be made according to the price current at the time and place of loading, including therein all dues and charges until on board, unless they are valued by the policy.

Art. 65. If the insurance is made on the return voyage from a country where trade is only carried on by barter, the valuation of the goods brought back shall be made on the footing of the value of those given in exchange for them, and the expense incurred for the transport.

Extracts from Valin.

On Art. 8, Valin remarks:—"It is not absolutely necessary to make a valuation of the ship in the policy, any more than of the goods, and the policy would none the less hold good without one, provided

that in fact the ship is not insured beyond its value. But the precaution of a valuation is good and salutary, to take away the uncertainty which otherwise would rest on the value of the ship, in order to make the comparison with the sums insured. This valuation, after all, is not absolutely conclusive (*ne fait pas loi*) against the insurer, who, in case of fraud, is allowed by this article to proceed to a valuation. But it is necessary that there should be manifest fraud before the assurer can be allowed to disturb the valuation; and the fraud will be manifest, if the valuation exceeds by a quarter, a third, and *à fortiori* by one-half, the real value of the thing." (*Guidon*, Art. 13)(*g*).

On Art. 15, Valin enters upon a discussion which incidentally bears on our present subject, on the question whether, in case of loss and abandonment of the ship, prepaid freight, though not insured, ought to be abandoned to the underwriters of the ship. The reasons for the affirmative he gives as follows:—"What the owner of the ship ought to insure is, the value of his ship, with all that it has cost him for the outfit" (*h*). . . . "But it would be contrary to all equity if the assured were to claim the value thus given to his ship, which has

(*g*) Valin, *Commentaire sur l'Ordonnance de la Marine*, p. 469. The Ordonnance is certainly most intelligible when studied in conjunction with the observations of its two great contemporary commentators, Valin and Emerigon.

(*h*) Ib. 476.

necessarily diminished in worth by the wear and tear of the voyage, the consumption of stores, and the wages of the crew, without being obliged to give account of the freight belonging to the ship, up to the amount of the goods saved. This is a sort of indemnity due to the insurer, in consideration of the obligation he contracts to pay the value given to the ship, notwithstanding the natural and inevitable wasting away (*dépérissement*) to which it is subject; an obligation which without this would be absolutely unjust and unlawful" (*i*).

Valin adds reasons, the force of which is very questionable, for not giving up the freight to the insurer beyond the value of (or freight on) the goods saved.

This passage is interesting, as being apparently, or at least as indicating, the source of that remarkable rule of English law, which to mercantile men always seems so contrary to common sense, that an abandonment of the ship carries with it the freight. The freight is the fund out of which the outfit, victualling, and expenses of the voyage are to be paid. To insure both freight and outfit is really to insure the same thing twice over. Whether the freight be prepaid or not, should make, from Valin's point of view, no difference; for no freight is insurable, and the value of the ship must always be taken as including the outfit. This rule, that the freight shall pass by abandonment to the insurer on

(*i*) Valin, p. 476.

ship, was perfectly reasonable in Valin's time, but has been transplanted into a soil less fit for it; as must sometimes happen, where more weight is given to authority than argument.

On Art. 18, Valin says: "This article, in permitting to insure the whole value of the goods laden in a ship, derogates from the ancient laws of the uses and customs of the sea: Art. 11, cl. 2, and Art. 3 and 15 of the Guidon; Ordonnance of Middlebourg, Art. 3; Assurances of Antwerp, Art. 11; and Art. 2 and 15 of the Assurances of Amsterdam; Kuricke, Diatriba de Assec., fol. 834, n. 3; Casa Regis, disc. n. 32. The Ordonnances of Barcelona and of Spain go still further, in that they forbid making insurance on more than seven-eighths in general, or more than two-thirds for voyages to the Indies" (*k*).

The learned editor of Valin, M. Becane, writing in 1829, has the following comment on this article:—"The Code of Commerce has not renewed the rule established in this article; the motives for it were however very wise. The facility of abusing insurance is unfortunately so great, that we shall be perhaps obliged some day to return to measures of precaution which it were much to be desired that we could do without. The obligation imposed on the assured to run the risk of one-tenth was a guarantee that he would give all

(*k*) Valin, p. 479.

possible care for the preservation of the property insured, in the innumerable cases where it is easy to save one's life in abandoning the ship and merchandize. The grave abuses which have taken place in insurances necessitated, two years ago, a penal law of great severity. In England, malpractices in this matter are beginning secretly to undermine commercial faith, and it is easy to foresee that the system of insurance will at last fall to pieces (*finira par tomber*), unless, by rigorous precautions, insurance is prevented from becoming a means of making a profit for the assured. All penal laws are powerless to attain this end; for how is it to be proved, when a ship has run ashore at night, for instance, on the coasts of Brazil or Coromandel, that it is by the evil design of the captain? we must suppose the fraud to be very innocent not to presume that precautions would be taken to elude the criminal laws, and obtain, *per fas aut nefas*, the payment of the insurance" (*l*).

On Tit. 22, the same learned writer says: "The Code de Commerce as well as the Ordonnance formally prohibits every insurance in excess of the value of the goods insured, and there is no rule more important. At the time of the drawing up of the Code, some legislators, carried away by the example of other commercial nations, demanded that the ancient principles should be modified on

(*l*) Valin, p. 480.

this fundamental point, and that more extension should be given to the system of insurance; but this proposal was rejected, and the abuses which are committed, in spite of the sage precautions of the law, show how dangerous it would have been to relax them. In our law of maritime commerce, insurance has never been a means of gaining, but only of not losing; it should be limited then to the value of the goods insured; a more extended system so manifestly invites fraud that it is surprising if it can have been practised for long together in any country. No doubt, if there were no fear of fraud, it would matter little to the insurer that the insurance were made for a sum greater than the value of the goods exposed to danger, so long as a premium is paid accordingly, since the greater or smaller value of the thing insured can have no influence on the probability of perils of the seas, which is what forms the basis of the calculation. But, although the will of man cannot bring on tempests or other maritime disasters, it yet does most often happen, that by his ability and energy he finds the means to face the danger, and diminish its worst consequences. But what energy, one may ask, is to be expected from a captain, whose life is not in danger, to save a ship insured for two hundred thousand francs, and not really worth more than half that sum? Is it not evident that he will gain a hundred thousand francs by a shipwreck? Our legislation wisely proscribes such a system,

which appears to me only suitable for the Republic of Plato" (*m*).

Extracts from Emerigon.

"The risk is of the essence of insurance properly so called; it is the principal foundation of the contract, which cannot subsist when it has been deprived of the nourishment which gives it life. This truth is independent of the will of man; it flows from the very nature of things. An insurance, denuded of a subject-matter exposed to risk, can never be a genuine insurance. The real value of the goods insured ought, then, necessarily to be relative to the amount insured. If by the policy they are valued beyond what they are worth, the surplus of the price may form the subject of a wager in those countries where insurance in the way of wagering is permitted; but the contract ceases to that extent to be a contract of insurance" (*n*).

"In contracts of sale, it is permitted to the parties to take advantage of one another, *se circumvenire*, provided they employ no deceit nor fraud. . . . This spirit of industry and address, which is tolerated between buyer and seller, ought to be severely rejected from the contract of insurance. Selling is a mode of acquiring, but insurance is only resorted

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(*m*) Valin, pp. 487, 488, n.

(*n*) Emerigon, *Traité des Assurances*, ch. 9, Intr., p. 265, of Boulay-Paty's edit.

to in order not to lose. . . . The nature of the contract of insurance, then, and the positive directions of the law, unite in obliging the assured not to go beyond the *actual value* of the thing insured" (*o*).

Emerigon then proceeds to discuss in detail the rules that should determine the actual value of goods; arriving at the conclusion that it should be, not necessarily what the goods have cost, but the market value at the place and time of the loading of the goods or commencement of the risk under the policy. And the same rule is applicable to the ship; its value is to be taken at the commencement of the voyage insured (*p*).

"The Regulation of Barcelona says that before making an insurance on the body of a ship, it is necessary that the ship should be valued by experts (*prud'hommes*), and this valuation shall be stated in the policy" (*q*).

"According to the Regulation of Antwerp, Art. 10, 'All those who wish to make insurance on the body of the ship, her guns, powder, balls, shall be obliged to have the whole valued beforehand by expert persons'" (*q*).

This precaution, however, Emerigon adds, was not required by the Guidon, and he does not consider it to be obligatory under the terms of the Ordonnance.

(*o*) Ib. ch. 9, § 1, p. 266.

(*p*) Ib. § 1, pp. 268, 269.

(*q*) Ib. 273. The writers Stypmannus and Kuricke, as Emerigon informs us, regard this precaution as essential.

§ 4. GROWTH OF INSURANCE LAW IN ENGLAND.

THERE seems little doubt that the practice of insurance was introduced into England by some of those Lombard merchants, Pisan, Genoese, Florentine, or perhaps Venetians, who established factories or agency-houses in London as in many other seaport towns of Europe, probably in the 13th or early portion of the 14th century. According to Malyne, who wrote in 1622, they introduced insurance into England earlier than into the neighbouring cities on the continent; and as a proof of this he says that Antwerp must have borrowed this contract from England, as there was, down to the time when he wrote, a clause inserted in every policy effected at Antwerp, and other places in the Low Countries, to the effect that it should be in all things the same as policies made in Lombard Street, in the City of London, the place where the Lombards and other merchants of London used to hold their meetings before the Royal Exchange was built (*a*).

Up to the year 1601, as we learn from the preamble to the Statute of Elizabeth, above cited, matters of insurance were regulated by the mer-

(*a*) 1 Marsh. Ins. 11.

chants themselves, or by certain "grave and discreet men" amongst them, appointed for the purpose by the Lord Mayor of London. That statute appointed a more formal court, which, however, appears to have soon fallen into disuse, and has left no record of its doings behind it. Nor is there, it may be added, any very important record of decisions in our Superior Courts of law, prior to the time of Lord Mansfield, which begins in 1756. Park tells us that there are not sixty reported cases in all this time, and those, he adds, "such loose notes, mostly of trials at *nisi prius*, containing a short opinion of a single judge, and often no opinion at all, but merely a general verdict, that little information can be collected on the subject" (*b*). Any one who reads these venerable judgments, of which there is a pretty large collection in Beawes's Lex Mercatoria (*c*), will, I think, be ready to agree with Mr. Justice Park, that very little information can be collected from them.

During this long period, however, there certainly existed amongst merchants a traditionary science of the law of insurance, to a great extent handed down no doubt from its Italian inventors, but likewise influenced to a great extent by what scanty insurance literature was then extant,—the Guidon, the Ordonnance of Louis XIV., and some of the continental

(*b*) Park, Ins. Intr. xlviii.
(*c*) Pages 226—246.

codes which shortly after were issued in imitation of the Ordonnance. The curious in such matters may find an example of the manner in which tradition or practice, abstract reasoning, and the authority of these foreign sea-laws, were worked up by these "grave and discreet men" into a body of insurance law, in the "Essay on Insurances," published in 1755, by "Nicolas Magens, merchant." Another, though far inferior, specimen of the same kind is to be found in the "Lex Mercatoria Rediviva," printed in Dublin, 1754, by "Windham Beawes, merchant."

Such were the raw materials out of which the English law of marine insurance had to be constructed. Lord Mansfield, who presided over the Court of King's Bench from 1756 to 1788, did more by far towards constructing a law of insurance than has, or indeed could by possibility have, been accomplished during any equally long period since. His long supremacy gave a sort of unity to the system which it has retained ever since, and thus his work may almost be compared to that of legislation. We have in his judgments the foundations of perhaps every department in our system.

"Lord Mansfield," says Marshall, "who appears to have taken much pains to obtain the best information, and to possess himself of the soundest principles of marine law and of the law of insurance, seems to have drawn much of his knowledge upon these subjects from this ordinance (that of Louis XIV.), and from the elaborate and useful commentary of

Valin. This may be perceived in many of his judgments on questions of insurance, though his lordship does not always think it necessary to cite his authority" (*d*).

Ten years before Lord Mansfield came to the Bench, A.D. 1746, was passed the only Act of Parliament which, between Queen Elizabeth's reign and the present Session of Parliament, has in any material respect touched the law of insurance. I ought perhaps to except various Stamp Acts; but so far it is only for the purpose of extracting revenue from insurance (*e*) that, with this solitary exception, Parliament has thought it necessary to interfere with our doings. This exception is the 19 Geo. 2, c. 37.

The purpose of this Act was to put an end to a certain practice of wagering under the form of marine insurance. This had been carried on by inserting in the policy certain clauses whereby the assured was excused from giving proof of being interested in the ship or goods insured, such as "interest or no interest," or "without further proof of interest than the policy;" or, more obscurely, and as it were in the way of inuendo—for where there is no interest there is nothing to abandon—"without benefit of salvage to the insurer."

The preamble recites that, "Whereas it hath been

(*d*) 1 Marsh. Ins. 18.

(*e*) The Acts which, in the last century, granted monopolies to certain companies were, even ostentatiously, for the purpose of extracting revenue.

found by experience that the making of insurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such insurances have encouraged the exportation of wool and the carrying on of many other prohibited and clandestine trades, which, by means of such insurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the public revenue, as to the great detriment of fair traders, and, by introducing a mischievous kind of gaming, under pretence of insuring against the risk on shipping and fair trade, the institution and laudable design of making insurances hath been perverted, and that which was intended for the encouragement of trade and navigation hath in many instances become hurtful of and destructive to the same." The statute therefore enacts (sect. 1), "That no insurance shall be made on any ship or ships belonging to his Majesty, or any of his subjects, or any goods or effects laden on board such ships, *interest or no interest*, or *without further proof of interest than the policy*, or *by way of gaming or wagering*, or *without benefit of salvage to the insurer;* and that every such insurance shall be void."

The statute refers only to English-owned ships, or cargoes on board them, and there are certain exceptions, as to privateers and contraband trade with

Portugal; exceptions which subsequent changes in the law have swept away.

The 6th section enacted that, "In all actions brought by the insured the plaintiff or his attorney shall, within fifteen days after he shall be required so to do in writing by the defendant, or his attorney or agent, declare in writing what sum or sums he hath insured or caused to be insured in the whole, and what sums he hath borrowed at respondentia or bottomry for the voyage or any part of the voyage in question."

We come now to the decisions of the Court of King's Bench in Lord Mansfield's time. I shall here follow the same method as with the Guidon and the Ordonnance, that is to say, shall set forth in order so much of them as bears upon either insurance in general, or insurable interest. This first period of English case-law has a sort of historical value of its own, which seems to entitle it to this fuller mode of treatment.

The first of these cases, then, is *Pelly* v. *The Royal Exchange Assurance Co.*, in 1757 (*f*).

Speaking of insurance in general, Lord Mansfield said: "From the nature, object, and utility of this kind of contract, consequences have been drawn, and a system of construction established, upon the ancient and inaccurate form of words in which the instrument is conceived. The mercantile law, in this

(*f*) 1 Burr. 341.

respect, is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must everywhere be the same"(*g*)

The next of these cases is *Godin* v. *The London Assurance Co.*, in 1758 (*h*).

This was a claim disputed by the insurers to the extent of one-half, on the ground that the same goods had been insured to their full value by two separate policies. The assured claimed his whole loss.

Lord Mansfield said: "First, to consider it as between the insurer and insured. As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole, for they have received a premium for the whole risk. Before the introduction of wagering policies, it was, upon principles of convenience, very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss, and therefore the satisfaction ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses. If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute *pro ratâ*, to satisfy that loss against which they have all insured. No particular cases are to be found upon this head,

(*g*) 1 Burr. 347. (*h*) Ib. 490.

or at least none have been cited by the counsel on either side. Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies a double satisfaction, the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it... And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contributions from the other, who was equally liable to pay the whole" (*i*).

The learned judge proceeded to point out that the basis of all this was, that the same person was to receive the benefit of the two insurances; for if two distinct persons had a separate interest in the same goods, so that each might be a loser by their destruction, *e. g.*, in the case of one having a lien on them, and another being the owner, each might insure to the full extent of his interest.

In *Goss* v. *Withers*, in 1758 (*k*), Lord Mansfield laid it down that, although when a ship is taken by the enemy the insurer is thereupon at once liable for a total loss, yet if she is recaptured, the insurer is liable for no more than her actual damage. "The reason," he said, "is plain from the nature of the contract. The insurer runs the risk of the insured, and undertakes to indemnify; he must, therefore, bear the loss actually sustained, and can be liable

(*i*) 1 Burr. 492. (*k*) 2 Burr. 683.

to no more. So that if after condemnation the owner recovers the ship in her complete condition, but has paid salvage, or been at any expense in getting her back, the insurer must bear the loss so actually sustained" (*l*).

Lewis v. *Rucker*, in 1761, is the first decision in an English Court which laid down a rule for adjusting particular averages on merchandize. As a basis for this, it was necessary first to state the basis of insurable interest as regards amount, and likewise to deal with valued policies; with which portions of the judgment, alone, I have to do here.

This was a policy on sugar, bound for London, valued at £25 per hogshead; and, at the time of arrival in London, the market price of the sugar was only £23 7*s*. 8*d*. per hogshead. The sugar, being damaged, only sold for £20 0*s*. 8*d*. Hence the actual loss to the merchant was only the difference, or £3 7*s*. per hogshead. If, however, it was allowable to take into account the state of the market either before or after the arrival of the sugar in London, it had at the time of insuring been worth £35 per hogshead; and if the sugar had been held for a rise of the market (as it would have been, had it not been damaged) it could have been sold for over £30 per hogshead.

"Insurance," said Lord Mansfield, "is a contract of indemnity against the perils of the voyage; the

(*l*) 2 Burr. 694.

insurer engages, so far as the amount of the prime cost, or value in the policy, that the thing shall come safe; he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods; if they be totally lost, he must pay the prime cost, that is, the value of the thing he has insured at the outset; he has no concern in any subsequent value. So likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost; as, if there be a hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold. . . ."

"The next objection, with which this case has been much entangled, is taken from this being a valued policy. I am a little at a loss to apply the arguments drawn from thence. It is said that a valued is a wager policy, like interest or no interest: if so, there can be no average loss, and the insured can only recover as for a total, abandoning what is saved, because the value specified is fictitious. The answer is: a valued policy is not to be considered as a wager policy, or like 'interest or no interest;' if it was, it would be void by the Act of 19 Geo. 2, c. 37. The only effect of the valuation is, fixing the amount of the prime cost, just as if the parties admitted it at the trial; but in every argument, and for every other purpose, it must be

taken that the value was fixed in such a manner as that the insured meant only to have an indemnity. If it be undervalued, the merchant himself stands insurer of the surplus. If it be much overvalued, it must be done with a bad view, either to gain, contrary to the 19th of the late King, or with some view to a fraudulent loss; therefore the assured never can be allowed in a court of justice to plead that he has greatly overvalued, or that his interest was a trifle only. It is settled that upon valued policies the merchant need only prove *some* interest to take it out of 19 Geo. 2, because the adverse party has *admitted* the value, and if more was required the agreed valuation would signify nothing. But if it should come out in proof that a man had insured £2,000, and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination that by such an evasion the Act of Parliament may be defeated. There are many conveniences from allowing valued policies, but where they are used merely as a cover to a wager they would be considered as an evasion. The effect of the valuation is only fixing conclusively the prime cost: if it be an open policy the prime cost must be proved; in a valued policy it is agreed" (*m*).

In *Hamilton* v. *Mendes*, in 1761, Lord Mansfield said:—

"An overvaluation is contrary to the general

(*m*) *Lewis* v. *Rucker*, 2 Burr. at 1170, 1171.

policy of the marine law, contrary to the spirit of the Act of 19 Geo. 2, a temptation to fraud, and a source of great abuse; therefore no man should be allowed to avail himself of having overvalued. The insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss; and the insured ought never to gain more. . . . Upon principles, this action could not be maintained as for a total loss, if the question was to be judged by the strictest rules of *common law;* much less can it be supported for a total loss, as the question ought to be decided, by the large principles of *the marine law*, according to the substantial intent of the contract and the real truth of the fact. The daily negociations and property of merchants ought not to depend upon subtleties and niceties, but upon rules easily learnt and easily retained, because they are the dictates of common sense, drawn from the truth of the case" (*n*).

In *Glover* v. *Black* (*o*), in 1763, Lord Mansfield decided, "that it is established now, as the law and practice of merchants, that respondentia and bottomry must be mentioned and specified in the policy of insurance." But he declared, at the same time, that they did not mean to determine generally that no special interest in goods may be given in evidence in other cases than those of respondentia and bottomry, if the circumstances of the case shall admit

(*n*) 2 Burr. 1213, 1214.

(*o*) 3 Burr. 1394.

of it. This rule, as to bottomry, Lord Mansfield says, did not at all turn on the words of 19 Geo. 2, c. 37, but merely on the practice of merchants, which he found, having consulted several of them, was, invariably, never to insure bottomry or respondentia without specifically so describing them on the policy (*p*).

I must now begin still further to limit my extracts, as I approach the greater fulness of later times; and shall now confine myself to those two or three leading judgments which necessarily ought to be studied in order to understand the English law on insurable interest and valuations.

Shawe v. *Felton*, in 1801 (*q*), was a case in which a ship employed in the slave trade was insured from Liverpool to the coast of Africa, and thence to the West Indies, by a policy valued at £6,000. The interest of the assured in the ship and outfit, including provisions and sea-stores for the slaves to be carried, and wages advanced to the crew, amounted, at the commencement of the voyage, to £6,000. She met with sea damage when nearing Demerara, to such an extent as to be not worth repairing. Thereupon the assured claimed a total loss, or £6,000. The underwriters objected, on the ground that before the loss a large quantity of her stores had been consumed, that the slaves, on whose account much of this outfit had been expended, had

(*p*) 3 Burr. 1401. (*q*) 2 East, 109.

been sold, and on terms which left a profit, so that the actual loss of the assured in respect of the subject-matter of insurance, was much less than £6,000. The actual market value of the ship at the end of the voyage, it was admitted, was much less. It was argued, on behalf of the assured, that a policy, though valued, was still no more than a contract of indemnity, and was only meant to bind the parties when the subject-matter continued nearly in the same state as at first, allowing for usual wear and tear. This, however, said the plaintiffs, was contrary to the whole course of procedure under valued policies. If admitted, it would take away all certainty, not only from valued, but from open policies; for every day's continuance of the voyage must reduce the value in these respects. "The custom of making valued policies," it was said in argument, "arose soon after the stat. 19 Geo. 2, c. 37." Magens on Insurance, which was first published here in 1755, nine years after the statute, treats it as a settled custom. In *Le Cras* v. *Hughes*(*r*) Lord Mansfield said: "The constant usage since the stat. 19 Geo. 2, c. 37, in the case of total loss, has been to let the valuation stand, and the parties are estopped from altering it, but an average loss opens the policy. I will give you the origin of the custom; it was in a case of *Erasmus* v. *Banks*, Mich. 21 Geo. 2, where Lord C. J. Lee said, *valuation of the sum insured is an estoppel*

(*r*) Park on Ins., p. 568.

in case of a total loss, but not so in case of an average loss only. On the 13th December, 1747, the same point came again before the Court in *Smith* v. *Flexney*, and was so determined." Lord Mansfield then proceeded to observe that it was a reasonable usage, and ought to be the rule.

Lord Kenyon, C. J., said: "It is not pretended now that there was any fraud in the case; but it is contended that the underwriter is not bound by the valuation in the policy. It is of little consequence to inquire what my opinion would have been upon the subject of valued policies in the year 1746, immediately after the statute of 19 Geo. 2 passed, for very soon after they were decided to be legal by as cautious and upright and painstaking a judge as ever presided in this Court (Lord C. J. Lee). He was succeeded by Sir Dudley Ryder, and this latter by Lord Mansfield; and during all this period such policies have been sanctioned by one uniform course of decisions. All this is now supposed to be wrong, and the rules by which this and other commercial nations have so long regulated their dealings, are now wished to be disturbed; but I will not lend my aid to open such a new and wide door of litigation, much exceeding everything that has gone before. If we were to enter into the calculations which have been contended for, every valued policy would have to be opened. Every man's meal on board a ship would take from the value of the original outfit. Is this to be endured? Will good faith admit of

it? Where is the line to be drawn between a greater or less diminution of the value? Therefore, as the rule and practice of valued policies have been acted upon and sanctioned since the passing of the statute, I am not one who wish *quieta movere*" (*s*).

Grove, J.: "We are desired by this motion to open a valued policy, contrary to the practice, and in a case where no fraud is imputed; for doing which no authority has been cited. If we were to admit it in this instance, it would be required in every other; and thus a door would be opened to endless litigation. Therefore, to avoid great injustice to individuals, and great public inconvenience, I think we are bound to refuse the application."

Laurence, J.: . . "Here it is not pretended that the subject-matter of the insurance was not *at first* of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect? Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed the subject-matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening? If on account of the peculiar nature of an African voyage there ought to be a difference in this respect between these and other trading adventures, the underwriters may, if they

(*s*) 2 East, 115.

please, introduce a special clause in the policy to provide for the diminution in value by the expenditure of stores and provisions in the purchase and sustaining of the slaves. As it stands at present, there appears no ground for making any such distinction."

Le Blanc, J.: "The present is an extreme case, because the loss happened at the last period of the voyage at which it could happen. But the same thing must occur more or less in every policy upon ships and outfit. The value of the property must be continually diminishing, and if the loss happen at the latter end of a long voyage, no doubt the property must be considerably deteriorated at the time by the usual wear and tear; and yet it is never objected that the underwriter is not liable for the original value."

When it had been settled by law that the amount of insurable interest on cargo was only the prime cost, and on ships the value at the commencement of the voyage, including the outfit, it might not unnaturally have been expected that the insuring of freight or of profit would, as in the Ordonnance of Louis XIV., have been prohibited. This, however, has not at any recorded period been the practice or law in this country. Before there was any decision in our Courts on this head, Magens, writing in 1755, says: "By modern laws or customs insurances may be made on divers kinds of merchandizes, on ships, on the freight or hire of ships, on the money for

fitting out of ships, on bottomry or money borrowed on the keel of a ship, on ships and their cargoes jointly, on the profits expected by the goods, on interest or no interest, that is to say, without further proof of interest than the policy;" and so on, enumerating various other speculative matters now gone out of use (*t*). This was before the 19 Geo. 2, c. 37. Park, writing in 1796, says that freight may be insured, citing Magens only.

In the case of *Lucena* v. *Craufurd*, in 1802, in Exchequer Chamber, the question whether freight was an insurable interest was discussed incidentally. In argument it had been said: "It may be contended that, as all interest in freight is a mere expectation, no one being entitled to it until the arrival of the goods," it was not a proper subject of insurance. But, on the other hand, it was said, "this expectation is founded upon an absolute contract entered into between the shipowner and the merchant, and is therefore an expectation which is not to be defeated by any other contingencies than those very perils against which he insures" (*u*).

In the judgment of the majority of the Court this argument is referred to with approval, as follows: "A rule has been laid down by counsel . . . . to which no exception has yet been suggested, viz., that where nothing intervenes between the subject

(*t*) 1 Magens, Essay on Insurance, p. 4.
(*u*) 3 B. & P. at p. 88.

insured and the possession of it but the perils insured against, the person so situated may insure the arrival of such subject of insurance, for he has an interest to avert the perils insured against" (*x*).

Chambre, J., who dissented from the rest of the Court on the main question at issue, agreed with them here; for, he said: "It would be a strange thing if freight could not be the subject of protection by an instrument which had its origin in commerce, and was introduced for the very purpose of giving security to mercantile transactions. It is a solid substantial interest, ascertained by contract, and arising from labour and capital employed for the purposes of commerce. . . . . The insurance of profits ascertained by positive contract may be equally just and reasonable, and is hardly to be distinguished in principle from the case of freight" (*y*).

The right to insure profits had been determined in an older case, *Grant* v. *Parkinson* (*z*), tried before Lord Mansfield. This was an insurance for £1,000, "on profits expected to arise from the cargo of the ship *Providence*, in the event of her safe arrival at Quebec." The assured was the owner of the cargo, which he had insured by a separate policy. This

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(*x*) 3 B. & P. 95.

(*y*) *Lucena* v. *Craufurd*, 3 B. & P. at 104. A shipowner may insure, under the name of freight, the profit he expects from carrying his own goods in his own ship. (*Flint* v. *Flemyng*, 1 B. & Ad. 45.)

(*z*) Cited in *Lucena* v. *Craufurd*, 3 B. & P. at 85.

insurance was allowed to hold good by Lord Mansfield, apparently on the ground that the assured might, if he pleased, have insured the profits along with the goods themselves in a valued policy, and it made no difference that he had insured the two portions of the same interest separately (*a*).

As to the effect of overvaluations there are the following decisions:—

Where goods were insured on board the *Maria*, valued at £5,000, and at the time of insuring invoices to that amount were produced to the underwriter, which were subsequently proved to be fictitious, the real value of the goods shipped being only £1,400, the underwriters disputed the claim altogether. It was contended that at least they were liable to the extent of £1,400. But Sir J. Mansfield, C. J., said: "If the bankrupts" (the plaintiffs) "intended from the beginning to cheat the underwriters, the assignees can recover nothing. The fraud entirely vitiates the contract" (*b*).

The ship *Sir William Eyre* (tried in 1868) was insured at and from Calcutta, for three months, on a valuation of £8,000; the three months to commence thirty days after arrival at Calcutta. On her way thither the ship was driven on shore and greatly injured, but reached Calcutta, and was there placed in a dry dock, where she was found to be

(*a*) 3 B. & P. 85.

(*b*) *Haigh* v. *De la Cour*, 3 Camp. 319.

so seriously damaged as not to be worth repairing. A notice of abandonment to the underwriters on the outward voyage was given, but too late to be available, and ultimately those underwriters paid £7,000 as for a partial loss. Subsequently, during the three months covered by the policy now in question, while the ship was lying in the dry dock at Calcutta unrepaired, the ship was wholly destroyed in a storm. The jury found that the *Sir William Eyre* was a ship at the time of the storm. One of the points raised at the trial was, that the damages ought to be reduced on the ground that the value stated in the policy, being enormously above its true value, could be re-opened (*c*).

Bovill, C. J., said: "In this case both parties have agreed . . . that, whatever its condition may have been at the time the policy attached, they will treat the value of the vessel as of a certain amount: both parties acting in good faith are willing to be bound by that valuation. If such be the agreement of the parties, upon what principle would the Court be justified in setting it aside? An exorbitant valuation may be evidence of fraud, but when the transaction is *bonâ fide*, the valuation agreed upon is binding" (*d*).

Willes, J.: "I am of the same opinion. The question comes to this, whether, where a valued

(*c*) *Barker* v. *Janson*, L. R., 3 C. P. 300.
(*d*) Ib. at 306.

time policy has been made upon a ship in distant parts without any express condition as to the state of repair of the vessel (it being settled that there is no implied warranty with respect to that), the underwriters are entitled to a deduction on its being shown that it would have cost a large sum of money on repairs to make her a complete vessel. No authority has been cited for it, and I never heard of underwriters claiming such a deduction, nor can I see that it would be equitable, because it would be contrary to the contract. It is said that there was a mistake as to the state of the ship; but a mistake, to entitle the parties to re-open a contract of valuation, must be such as would entitle the parties to proceed in equity for relief. It must have been a mistake of both parties in respect of something which was material to the contract. The truth is, that the underwriters entered into the contract without caring to know whether the ship was in repair or not. Then it is said that the defendant's view is supported by several works of authority. It cannot, however, fraud apart, make any difference that the vessel has been enormously overvalued, except in respect of the statute 19 Geo. 2, c. 37. Apart from statute, parties could make what wagers they liked with respect to vessels. That act forbids insurances by way of wager, but the law remains as it was before where the insured has an interest in the vessel and there is no wager. The meaning of

the authors referred to, therefore, must be that an enormous overvaluation is proof of either fraud or wagering. Here there was no wager, the insurance having been *bonâ fide;* and it having been settled by *Irving* v. *Manning* (*e*) that valued policies are valid if there be no fraud or wagering, I think it would be wrong to make any doubt in this case by granting a rule" (*f*).

Montague Smith, J.: "I am of the same opinion. It has been found convenient that the value of the ship should be agreed on and stated in the policy, in order to avoid such inquiries as that now brought before us. If we were to grant this rule, it would become a question of degree in each case whether the difference in value was sufficient to entitle the parties to re-open the valuation. A thousand things might lessen the value of a vessel between the time of a policy being made and the time of its attaching, such as natural decay, worms, or the ship becoming a drug in the market; and all the evils intended to be avoided by this kind of policy would arise again" (*g*).

Irving v. *Manning*, the case referred to in the above judgment, was a case tried in 1847 in the House of Lords. The ship *General Kidd* was valued in the policy at £17,500, was damaged in a

(*e*) 1 H. L. C. 287. (*f*) L. R., 3 C. P. at 306.
(*g*) Ib. at 307.

storm so that she would cost £10,500 to repair, and when repaired would have been worth no more than £9,000. This was determined to be a total loss, and the underwriters were to pay £17,500.

Patteson, J., in giving the answer of the judges to the question put to them by the Lords, began by giving the reasons which would have made this a total loss, had the policy not been valued, and then proceeded: "What difference then arises from the circumstance that the policy is a valued policy? By the terms of it, the ship, &c., *for so much as concerns the assured, by agreement* between the assured and assurers, are and shall be rated and valued at £17,500, and the question turns upon the meaning of these words. Do they, as contended for by the plaintiff in error, amount to an agreement that for all purposes connected with the voyage, at least for the purpose of ascertaining whether the ship is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired? Or do they mean only that for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the *quantum* of the assured's interest?

"We are all of opinion that the latter is the true meaning, and this is consistent with the language

of the policy, and with every case that has been decided upon valued policies. . . ." (*h*).

"It is argued that this course of proceeding infringes on the generally received rule, that an insurance is a mere contract of indemnity, for thus the assured may obtain more than a compensation for his loss; and it is so. A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify" (*i*).

Lidgett v. *Secretan* (*k*) was tried in 1871. The ship *Charlemagne* was insured by one policy from London to Calcutta and thirty days, and by another at and from Calcutta home: in both, valued at £20,000. In going out to Calcutta she struck on a reef of rocks, and suffered damage which was to have been repaired at Calcutta. During the progress of these repairs, however, the outward policy expired; and afterwards, before the repairs were nearly completed, the ship took fire in the dock and became a total loss. The Court of Common Pleas decided that the underwriters on the outward passage were liable for all the damage caused by striking on the reef, whether it had actually been repaired or not;

(*h*) 1 H. L. C. at 304, 305.
(*i*) Ib. 307.
(*k*) L. R., 6 C. P. 616.

that is to say, to an average loss based on the estimated cost of the entire repairs; and that the homeward policy was liable for the full £20,000. The opinion of the Court was delivered by Willes, J., who said :—

. . . "The second point arises upon the second policy, and is one of great importance, and one which has been the subject of much discussion and criticism both by lawyers and legislators; and yet nobody has been able to improve upon the practice as to valued policies which has been recognized and adopted by shipowners and underwriters, and has, at least amongst honest men, the advantage of giving the assured the full value of the thing insured, and of enabling the underwriters to obtain a larger amount of profit. It saves them both the necessity of going into an expensive and intricate question as to the value in each particular case; and its abandonment would in the end, as it seems to me, prove highly detrimental to the interests of the underwriters. Of course, if the sum inserted as the value of the ship were so outrageously large as to make it plain that the assured intended a fraud on the underwriters, the latter would have their remedy. So, if the jury should think that the real intention was a wager on the value of the ship. There are many reasons why this system of valuation, though unquestionably often resorted to for the purpose of evading the law against wagering policies, is useful. Ships are often insured whilst on a distant voyage,

and when their exact condition or value cannot be ascertained. It is manifestly important that the owner should be able to insert a fair sum as the value of the vessel, treating her as sound, though she may at the time have sustained damage even to the extent of what may ultimately turn out to be a total loss, that being, in fact, one of the perils insured against. Another case may be put, viz., the case of an owner fitting out the vessel for a particular adventure, such as the conveyance of troops or emigrants, great expenditure, which does not increase the market value of the ship, being required for the voyage; he may take all that expenditure into consideration in fixing her value in the policy, and may recover it from the underwriters in case of loss. In these and many other cases it is extremely convenient that a fixed and ascertained value should be inserted in the policy as the sum to be paid in the event of a loss. The result of the decisions in this country, as well as in the United States, and I believe in North Germany, is, that the value mentioned in the policy is a conventional sum, not representing the real value of the vessel, but the sum to be paid by the underwriters in the event of a loss. In the absence of fraud or wagering, it seems to me that the value is to be taken to be the conventional sum to be paid in the event of a loss, whatever the actual value of the vessel might be at the time" (*a*).

(*a*) L. R., 6 C. P. 627—629.

The late Lord Chief Justice, Lord Cockburn, took occasion, in a case which came before him at Nisi Prius, to protest with considerable energy against a state of the law which however he had no power to alter. After reciting the precedents by which he was bound, he continued: "But, I confess that, to my mind, this is a state of things much to be deprecated. Insurance has always been deemed in its nature a contract of indemnity. It is obvious that, if the parties are allowed to have their vessels or their goods insured at sums far beyond their value, and underwriters are ready to insure at such sums, the insurance becomes a system of gambling. Now we have unfortunately quite enough gambling already in this country, and nothing is more to be deprecated than the extension of this system of gambling to insurance, and above all to insurance on ships" (*k*).

(*k*) *McAndrew* v. *Saunders*, 13 Mitchell's Maritime Register, pp. 468, 498.

CONCLUSION.

I HAVE now reached a point at which nothing further remains but to sum up briefly the results of what has here been set down, and then to consider what practical conclusions may be drawn from them.

At the present moment we find ourselves on the eve, in all probability, of a very important change in this matter of insurable interest and the valuation of it. It has been seriously proposed to abolish valuations, and to lay down an absolute rule that a shipowner shall in no event be permitted to recover under his policies a larger amount than he has actually lost. And, even on the part of those who most strenuously resist this proposal as impracticable, even on the part of shipowners themselves, we have a wide-spread feeling, in many quarters frankly acknowledged, that over-insurance or over-valuing is an evil which ought to be put a stop to, so far as this can be done without unduly hampering trade. In this state of opinion, it is evident that some considerable change is inevitable.

In these pages we have the materials, very much in the rough, and hastily thrown together under difficulties as to time, for seeing what has been done in other times and countries towards dealing with the difficulties which are before us at this moment,

and likewise for tracing the manner in which the present state of things has grown up by degrees amongst ourselves.

We have seen, in the first place, that at the earliest stage in which insurance may be said to appear on record as a developed system, after an unrecorded process of growth and fermentation extending over something like three centuries, it comes before us as a system severely limited by restrictions, evidently intended to guard against those very dangers which we have before our minds at this moment. These restrictions, too, were more severe even than those which are now, almost by common consent, pronounced to be more than we can bear.

The framers and first expounders of the system of insurance were probably merchants who were likewise statesmen and rulers, the merchant princes of the Italian republics, and if not this, were certainly citizens of small sovereign states, in which the public life and concern for the common weal was far more intimately blended with the everyday interests of private persons than has ever been the case before or since, unless in Athens in the time of Pericles or Demosthenes. Hence it is not surprising if the view taken by such men was one which did equal justice to that which I have called the statesman's aspect of insurance as to the more purely mercantile aspect. And they, as we have seen, held it dangerous and not to be allowed, not merely that a shipowner or merchant should insure beyond the real

value of his property, but that he should insure up to it; they obliged him to take one-tenth part of the risk himself, and likewise, what was in many cases still more severe, they forbade him to insure at all that portion of his expectation which took the form of profit, running out beyond that which the thing insured had actually cost him.

We have seen, again, that after a time this system or rule of insurance, which was at first common to all Europe, that is, then, to all the world of sea-traffic, began to pass out of the hands of merchants into that of statesmen, and to become the subject of legislation; and, as a consequence, to become different in different countries. France, under Louis XIV., took the lead. The French law made one relaxation of the old severity: it recognized the distinction between the merchant or owner of cargo, and the owner of the ship: it was not too dangerous to allow the former, who had less to do with the equipment and management of the ship, to insure the whole value of his goods, instead of nine-tenths only; and this, therefore, the merchant was allowed to do, though the shipowner was not. In other respects, however, the French law adhered to the ancient restrictions; and for the most part, if not altogether, it adheres to them still.

In England, meanwhile, by degrees, while still retaining in some respects the name of restrictions and doctrines only intelligible as being survivals of these old rules, we have succeeded in rendering

them names and nothing more. In name, the amount to be insured on goods is no more than the goods have cost: in fact, goods are always valued in the policy, just as much above their cost as the merchant pleases. In name, wager policies are illegal: in fact, those only may not wager whose wagering could do little harm, that is to say, strangers to the property, who have nothing to do with the fitting out or care of the ship; while those who have the charge and control are not merely permitted, but even stimulated and almost obliged by the law to wager largely,—for what is an over-insurance but a wager? for the law declares that the right sum to recover in case there is no valuation is, the value of the ship on starting, with all her stores and outfit, and advance-wages to the crew, *plus* the gross freight receivable at the end of the voyage, with no deduction of the charges which must have been incurred to earn it. It is no exaggeration to say that the English law, as it stands, has absolutely and completely abolished, for all practical purposes, the ancient restrictions on this contract, imposed to prevent its becoming dangerous.

It is generally supposed in this country—whether rightly or not I hardly know—that the restrictions imposed on insurance by the law of France have had a very prejudicial effect on the mercantile shipping of that country, and are to a great extent answerable for the low position which its carrying

traffic at present occupies, in proportion to the wealth and mercantile energy of that great nation. I shall only note as significant one fact, which is well known to shipowners and underwriters. A tolerably large business in the insurance of British property, and particularly of British ships, is at the present day carried on by means of policies effected in France; and in these policies it is the invariable rule to insert a clause, by which the insurers undertake to adopt as their basis, in all respects, the law of Great Britain, making the policy to have the same effect as if it were made at Lloyds.

What, on the other hand, has been the effect in this country of our own system of complete laxity in this matter? Has it led to those evil consequences which we might perhaps, by *à priori* reasoning, have anticipated? Is it found by experience that English merchant-ships are as a rule less safe than those of other countries, and particularly of France? Is the wilful wrecking of them a thing of more common, or even appreciably common, occurrence? Are they, as a rule, worse constructed, manned, or found, than those of other countries? Is it notorious that the premiums of insurance on cargoes carried in English bottoms are higher than those of any other country? I believe all these questions must be answered in the negative.

This, however, it must be admitted, is an imperfect and unsatisfactory way of arguing the question. It may—indeed, I think it does—go so far as to

prove that the evil consequences of over-insuring, or of licence to over-insure, are not so serious as some rhetoricians have painted them. As for over-insuring as part of a deliberate scheme to cast away a ship, I have heard much talk of it, but seen so very little of it in the course of a good long life-time spent among such matters, that I am convinced it is a rare and exceptional crime; the risk to life in the process, and the almost certainty of detection afterwards, in a matter which requires usually more than one accomplice, must always prevent its becoming a popular profession, like housebreaking. It is at all events not a matter common enough to deserve any widespread and harassing precautions. The case is not so clear as regards neglect and ill-placed economies in the building and equipment of ships. That these do not largely exist, and have not caused the loss of many a ship and many lives, is not proved by showing that England does not compare unfavourably with other countries in these respects. It does, in fact, compare very favourably with most, if not all; and this fact does seem to prove that our licence of over-insuring is not, after all, so extremely pernicious. But the question we ought to ask ourselves is not, are we doing better than other countries, but, are we doing as well as we ought to do and might do? And this question, like the preceding ones, must, I fear, be answered in the negative.

We come here upon a question of fact which is

likely to be keenly debated, and which deserves, I think, a much fuller and more searching enquiry than it is likely to receive during the discussion of Mr. Chamberlain's Merchant Shipping Bill: namely, to what extent is the loss of life at sea owing to neglect or undue parsimony in the construction, equipment, outfit and manning of ships, indirectly resulting from the protection from loss afforded by insurance?

Some persons, even at the present stage of the discussion, seem to think an answer to this question unnecessary. It is undeniable, they say, that *some* loss of life is due to this cause: that being so, why waste time over enquiring *how much?* If we can save *one* ship's crew, *one* human life, by precautions which affect merely property, ought we not to take them? This, however, is not a practical view of the subject. Property, too, means human life; for the restriction of trade must mean, ultimately, a reduction of the population: so that the question whether the saving of life is *worth* the restriction of trade cannot be evaded; and this involves the enquiry, how much life you may reasonably hope to save, and how much trade you must destroy for the purpose.

In my opinion, therefore, a grave responsibility must rest on those who insist on legislating on this subject without that preliminary enquiry needful in order to provide the materials for legislating safely. That, however, is not my affair.

Next to this question of fact, and equally necessary to be answered, before we can determine what change ought to be made, comes a question of principle or theory, namely; assuming that a loss of life at sea, otherwise preventible, is due to the cause above stated,—to undue parsimony in the building, equipping, and keeping up in proper condition, of ships, resulting from the protection given by insurance—is it likely that this evil will be at all affected, so long as you allow ships to be insured *up to* their value, by merely prohibiting their being insured *beyond* their value?

Of course, if we were to go back to the old rule, and insist upon it that every shipowner should run the tenth part of the risk himself, this would be a very effectual remedy. We should see a marked change all over the country, and a great briskness in every ship-yard, the very day after such an Act were passed. To take one example, familiar to every one connected with shipping. At present, very few shipowners—they could almost be counted on the fingers—think it necessary, in building or equipping their ships, to go one step beyond the requirements of Lloyd's Register Book. That book prescribes the thickness of plates, the number and size of bulkheads, and almost every detail as to the strength of a ship, what anchors and chains she must carry, and a variety of other particulars. As applied to large vessels, of proportions more or less new, many of these particulars must be more or less

experimental. In the opinion of Lloyd's Committee of Registration—a body of men certainly admirably competent for their difficult task—these particulars represent the *minimum* of strength and stability adequate for the purpose: if a ship falls short in any of these particulars, she is refused admission to the Registry Book, or at best is only admitted with some disparaging earmark. A new ship, then, seldom or never falls short of this minimum of strength; but, equally seldom, not to say never, exceeds it. The reason is, that the shipowner who insures his ship fully can gain nothing by any extra outlay in this direction. Underwriters, it is notorious, as a rule, make no distinction in their premiums: all who come up to the standard in Lloyd's Book are rated alike; that is, perhaps, a necessary result of the wholesale system of dealing to which they are driven by competition. That is to say, the present system of insurance causes that the minimum of efficiency becomes, in the vast majority of cases, likewise the maximum. And so all through. The shipowner who insures his ship up to her value has no pecuniary interest in doing more to her, in any direction, beyond coming up to a sort of *minimum* standard. She must not be unseaworthy—that is all he need attend to.

If the owner were obliged to take a tenth part of the risk himself, it would at once become his interest to go far beyond this. His ingenuity would at once be on the stretch to devise ways and means of reach-

ing, not the *minimum*, but the *maximum* of strength and efficiency. How far that would go, and what would be the results in diminishing the loss of life at sea, may be an interesting matter of speculation; but that the results would be considerable, can hardly be doubted. But merely to forbid a shipowner to insure *more* than the value of his ship would in this direction have no effect whatever. The cause of the whole evil here is, not that he hopes to gain by a shipwreck or disaster, but simply that he is protected from loss. He is parsimonious, or careless, because he has no interest to be otherwise.

I do not write this as advocating the severer course. To compel a shipowner to take a portion of the risk himself would be impracticable, no doubt, in the present state of opinion, and, I may add, in the present state of our knowledge. It has not yet been sufficiently demonstrated that there is enough of preventible loss of life at sea to justify so sweeping a change. All I wish to point out is, that the milder remedy proposed does not reach the true seat of the malady. It may put an end to the wilful casting away of ships—a thing which is very rare; I do not see that it can, directly and of itself, do anything towards affecting the neglect and parsimony, the stopping short at the *minimum* of efficiency, which is the far more frequent cause of preventible loss of life.

Indirectly, however, and as a step towards something better, the proposed change may do good. I

understand the Bill is likely to be so modified as, without absolutely forbidding valued policies, it will introduce such regulations as shall prevent *over*-valuing, and restrict the amount of indemnity to the amount of loss. If a time shall ever come when it is recognized as obligatory on a shipowner to bear a part of the risk himself, it evidently will be then necessary, in order to prevent this precaution from being nugatory, that there should exist some such regulations as those here proposed; for it would then, as now, be necessary that the true value of the ship should be determined. What is proposed, I understand, is that there should be some public registration of values, easily accessible. This will in the course of time furnish a sort of history of the ship's value from the time of her building or purchase to the present moment; which will record what she was worth when new, and will show her gradual decline in value as she grows older; this, it is conceived, will render large and certainly fraudulent over-valuation impossible. This sort of supplement to the history of the ship which is at present contained in Lloyd's Book, ought to be of great assistance towards putting an end to over-insurance. Supposing this can be so managed as not unduly to harass shipowners, there seems no great objection to it, and it may do some good. I am sorry I cannot speak more warmly in its praise.

Then it is proposed that power shall be given to the Courts of law, when it shall have been proved to

them that a ship has been *grossly* over-valued, though without fraud, to reduce the amount payable by the underwriters to her true value. To this there seems no reasonable objection. It is, in fact, only coming to the wholesome provision of the Ordonnance and the older law of insurance.

One method of preventing the over-valuing of ships for insurance which has been talked about, would certainly be effectual. The valuation inserted in the policy ought, it has been suggested, to be taken as conclusive against the owner for all purposes; he must not be at liberty to say that this is not his ship's real value. On this value, therefore, his ship must contribute to general average; and this amount must serve as the test to determine whether, after an accident, she shall be condemned as not worth repairing. The inconveniences to which under such a rule a shipowner might be subjected in consequence of valuing his ship too high would operate, it is thought, as a very effectual self-acting prevention of this offence.

To this there is, however, a theoretical objection which requires to be considered. The shipowner may object with some force against this taking of one uniform value, that the ship is not in fact of one and the same value throughout the entire period over which his insurance extends. As a rule, now-a-days, a ship is insured for a twelvemonth; the law, for the sake of the stamp, forbids the insuring

for a greater length of time, but that is the usual term. During that time the value of a ship frequently undergoes considerable change. The owner is allowed to fix a value which shall not fall short of an indemnity in case his ship is lost when at her highest value in this period. He may be called on to contribute to general average, or to determine whether she is worth repairing, when she is at her lowest. Is it reasonable that he should be required to take the same sum as the measure of both these unequal amounts?

To this it may perhaps be replied; this is not more unreasonable than that you, who are supposed to insure merely for indemnity, should claim to be allowed to set on your ship its highest value during the year, and then to receive from your underwriter in case of total loss this full amount, although before she were lost she had been reduced, from causes with which the underwriter has nothing to do, to a much smaller value. If your valuation is to be treated as a mere "conventional amount," as Mr. Justice Willes has said, having no necessary relation to the real value of what you have lost, you cannot complain if this convenient fiction of the law is applied all round—against you, as well as in your favour. In that way only can it be made a check upon your abusing this liberty to value which the law indulges you with.

It is worth consideration, further, whether this

opportunity should not be taken, to remedy that departure from the principle of indemnity which is shown in the decisions of *Barker* v. *Janson* (*a*) and *Lidgett* v. *Secretan* (*b*), above set forth. A valuation is intended to represent what the ship is worth in her ordinary undamaged condition; and if such a ship is lost, within the term insured, by some peril insured against, that sum the insurer ought to pay. But if, previously to the term insured, or through some peril not insured against, that ship has been so damaged as to be appreciably reduced in value, so that what is lost under the policy is not a complete, sound ship, then it is not right, on any true principle of indemnity, that the insurer should pay the full policy value. This might easily be provided for by a clause in the Act.

Here, then, I will leave this subject. When I began I proposed to myself, humbly enough, merely to throw together some materials which might possibly be used by others in the course of the parliamentary discussion on the Merchant Shipping Bill. I wish the collection were more complete and better arranged. I have done, however, as much as my possibilities of leisure allowed, and I must leave the result with the hope that there may be found in it something not wholly unserviceable towards this important discussion.

(*a*) *Ante*, p. 92. (*b*) *Ante*, p. 96.

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